CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 268.

H. C. CROSS AND GEORGE A. EDDY, RECEIVERS OF THE MISSOURI, KANSAS AND TEXAS RAILWAY, AND THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY OF TEXAS, PLAINTIFFS IN ERROR,

vs.

J. M. EVANS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED MAY 4, 1895.

(15,891.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 18, 1896.

The plaintiff in his original petition alleged that he received serious and permanent injuries—among others, the loss of a leg. He was working as a brakeman for said receivers when a wreck occurred, derailing the train, inflicting upon him the injuries because of which he brought the suit. It was alleged in said original petition that the wrecking of said train was brought about by the drawhead of the fifth or sixth car or other car in said train of cars pulling out and dropping down on the track, catching on the ties, and jamming the cars back and throwing them off the track and into a creek. It was charged that the drawhead was old, defective, out of repair, and in no fit condition to serve for the purpose for which it was intended; that by reason of the bad and defective drawhead the wreck occurred and plaintiff was injured. This was the only ground of negligence alleged in plaintiff's original pleading.

3 On the 20th day of April, 1891, Eddy and Cross filed their petition and bond for removal of said case in the district court of Wood county, Texas, on the grounds of diverse citizenship, Eddy and Cross alleging that they were citizens of Kansas, and on the further ground of Federal question involved, and on the 4th day of May, 1891, the bond was approved, the petition granted, and the cause removed to the United States circuit court for the eastern district of Texas, sitting at Tyler.

On the 23d day of August, 1892, plaintiff filed his first amended original petition complaining of Eddy and Cross and receivers, and also of the Missouri, Kansas & Texas Railway Company, incorporated under the laws of Texas, though he did not give it its full corporate name. He alleged that since the filing of the suit all properties in the hands of the receivers had passed into the hands of the railway company. In this petition, in addition to the grounds of negligence set out in the original petition, plaintiff for the first time alleged further grounds of negligence upon the part of the receivers substantially as follows: "That the track at the point where the cars were derailed was out of repair and in an unsafe and dangerous condition; that the rails were old and worn, the fish-plates without bolts and partially unfastened; the spikes which should hold the rails in place were loose and easily turned from their proper place; the ties decayed, in a rotten condition, and crumbled to pieces under the slightest pressure; the road-bed was soft, uneven, and beaten down so as to produce an unsafe track, and that said train of cars upon which plaintiff was riding was overturned by reason of said bad and defective condition of said road-bed, ties, fish-plates, and rails."

On the 23d day of August, 1893, plaintiff filed his second amended original petition, complaining of the receivers and of the Missouri, Kansas & Texas Railway of Texas. He alleged the grounds of negligence as in his first amended original petition. While the railway company is styled in plaintiff's first amended original petition the "Missouri, Kansas & Texas Railway Company," it was in truth the Missouri, Kansas & Texas Railway Company of Texas of which he was complaining, as the petition shows, and which, as hereinafter appears, was the company brought before the court. It fur-

ther appears that on the 16th day of April the legislature of the State of Texas enacted a law authorizing the sale and conveyance of the Missouri, Kansas & Texas Railway Company's lines of railroad heretofore operated as the property of the Missouri, Kansas & Texas railway, and to provide for and authorize the sale and transfer and conveyance of said lines of railway to and the purchase and operation thereof by a single corporation to be incorporated under the laws of the State of Texas. This act of the legislature was pleaded at length. Among other clauses, it contained a provision by which the railway purchasing the property of the Missouri, Kansas & Texas railway should be liable for debts and judgments against it and its receivers in the same way that the Missouri, Kansas & Texas railway itself would have been liable. Under this authorization the pleadings and evidence both showed that a corporation known as the Missouri, Kansas & Texas Railway Company of Texas was formed, and about 1891 the lines of railway of the Missouri, Kansas & Texas railway, including the Taylor, Bastrop & Houston railway, were duly conveyed to the Texas company.

On the 14th day of September, 1893, the Missouri, Kansas & Texas Railway Company of Texas, having been served, filed its original answer. It excepted to the maintenance of the suit against
4 it because it appeared from plaintiff's petition that both it and plaintiff were citizens of the State of Texas, and that therefore the court did not have jurisdiction of the suit as to it. It also raised the same question by answer in pleading to the merits. This defendant excepted to so much of said petition as sought to recover on account of any defects in the rails, ties, or track because more than one year had elapsed between the receiving by plaintiff of his injuries and the setting out of any cause of action based upon this ground. It further pleaded that plaintiff's injury was caused from accident in no way brought about by any negligence of the receivers; that if there was any negligence upon the part of any one it was upon the part of the plaintiff alone. It further pleaded that the drawheads were in good condition; that the car handled by it was a foreign car; that it had had the drawheads subjected from time to time to close inspection, and that such inspection failed to show any defect. It further pleaded that if plaintiff had any cause of action it arose against Eddy and Cross while they were operating the Missouri, Kansas & Texas railway as receivers; that about the 9th day of June, 1888, in a suit in equity pending in the United States circuit court of Kansas and by ancillary proceedings in the United States circuit court for the northern district of Texas George A. Eddy and H. C. Cross were appointed receivers of the Missouri, Kansas & Texas railway, and all properties of the railway were turned into their hands; that about the 1st day of July, 1891, by virtue of an order of said United States circuit court all property in the hands of said receivers was by them turned over to the Missouri, Kansas & Texas Railway Company, not the Missouri, Kansas & Texas Railway Company of Texas, but a corporation of that name formed under the laws of Kansas, and that said George A. Eddy and

H. C. Cross were then discharged as receivers of said property; that said courts retained jurisdiction of said properties and of said pending litigation for the purpose of enforcing against said receivers and said property such claims as might be presented to and allowed by them; that it was further provided in the orders discharging said receivers that all persons having claims against them by reason of causes of action arising during the receivership should present the same on or before the 1st day of January, 1892, and in event of their failure to do so their rights should cease and determine. It was further pleaded that plaintiff well knew of such orders and decrees, but failed and refused to intervene. It further appeared from the pleading that Eddy and Cross had been fully and finally discharged as receivers on July 17th, 1892, and that due notice by publication regarding persons having claims against the receivers and intervention had been given.

On the 14th of September, 1893, Eddy and Cross adopted the answer of the Missouri, Kansas & Texas Railway Company of Texas, it and they for the first time pleading the discharge of the receivers. On the 8th day of January, 1894, the defendants' demurrers both to the jurisdiction and to the merits were overruled. The case was tried before a jury, and on the 11th day of January, 1894, resulted in a verdict and judgment for plaintiff and against the Missouri, Kansas & Texas Railway Company of Texas for $7,500.00, but discharging Cross and Eddy, receivers.

A motion was made and granted for an extension of time in which to prepare motion for a new trial and bill of exceptions.

A motion for a new trial was filed on the 17th day of January, 1894, and was overruled on same day.

5 On the 20th day of February, 1894, a bill of exceptions was duly filed and approved by the court, being within the time allowed by the extension granted by the court.

On the 20th day of February, 1894, writ of error was allowed to Receivers Cross and Eddy and to the Missouri, Kansas & Texas Railway Company of Texas.

In the pleadings no allegations were made as to any betterments on the road, and in the proof no evidence was offered as to these. On the trial of the case it appeared that Eddy and Cross had been finally discharged as receivers on the 17th day of June, 1892, and the court directed a verdict for them.

The following is the assignment of errors for review in this court:

Now come H. C. Cross and George A. Eddy, receivers of the Missouri, Kansas & Texas Railway Company of Texas, and say that in the record and proceedings in this cause there is manifest error, in this, to wit:

First. The court erred in overruling defendants' general demurrer.

Second. The court erred in overruling the first special exception of the Missouri, Kansas & Texas Railway Company of Texas, adopted by Eddy and Cross, to plaintiff's second amended original petition, because both plaintiff and the Missouri, Kansas & Texas Railway

Company of Texas were citizens of the State of Texas, and the United States circuit court for the eastern district of Texas could not take cognizance of the controversy between plaintiff and said defendant.

Third. After inspection of the pleadings and record and hearing the evidence, it appeared to the court that plaintiff and the Missouri, Kansas & Texas Railway Company of Texas were both citizens of the State of Texas, and the court should have declined to proceed with the case and attempt to render a judgment in favor of the plaintiff against said railway, because, both being citizens of the same State, this court was without jurisdiction as to the controversy between them, and, it appearing that the receivers had been discharged, said court should have dismissed the case, or of his own action should have remanded it to the State court from which it came.

Fourth. The court erred in overruling the second special exception of the Missouri, Kansas & Texas Railway Company of Texas, adopted by Eddy and Cross, to plaintiff's second amended original petition, because an inspection of the pleadings showed that plaintiff received his injuries on the 1st day of September, 1890, and the first day that any claim was made for damages against defendants on account of the defective condition of the rails, ties, or track or in any other way than having a defective drawhead was on the 23d day of August, 1892, so that plaintiff's cause of action was clearly barred by the statute of limitations.

Fifth. The court erred in refusing to give the following instructions requested by defendants: "In this case you are instructed to return a verdict for defendants," because, first, defendant Missouri, Kansas & Texas Railway Company would be liable only in the event that the Missouri, Kansas & Texas Railway Company would be liable, and said last-mentioned company would be liable, if at all, only in case betterments were made upon the road by the receivers while it was in their hands and returned to it with such betterments, and there was no pleading or evidence whatever of such betterments being made on the road nor any pleading
6 nor evidence showing the application of any earnings by the receivers to the betterments of the road. Second. The evidence showed that the wreck was caused by reason of a drawhead having pulled out; that the receivers had made a careful and proper inspection and failed to find any defect in the drawhead, and the evidence failed to show any negligence upon the part of the receivers causing the injury. Third. If plaintiff had a cause of action because of the defective condition of the track the same was barred by the statute of limitations.

Sixth. The court erred in this paragraph of his charge: "You are instructed that it was the duty of Eddy and Cross, operating this road, to furnish the employés a reasonably safe road-bed and reasonably safe appliances, and if the injury occurred to plaintiff in consequence of neglect to do either of these two things he would have a cause of action unless defeated under the instructions that I hereafter give you, because there was no evidence that any defect

in the road-bed had aught to do with bringing about the injury, but, on the contrary, the same was shown to have been caused by a drawhead pulling out, which was a matter of pure accident."

Seventh. The court erred in the following paragraph of his charge, as hereinafter shown: "Therefore the only question left for your consideration is whether the accident was the result of a defective track. If you believe from the evidence that the train was derailed, not in consequence of the drawhead pulling out, but in consequence of a defective track, plaintiff would be entitled to recover, unless you believe from the evidence that the general condition of the track was known to plaintiff before he entered the employment of the company. If you believe from the evidence that he did not know the general condition of the track or knew it was bad and voluntarily entered into the service of the company, then he would assume the risks incident to such condition. If he knew that, he could not recover. If he did not know it and entered into the service and the wreck was caused by that condition of the track, he could recover under the measure of damages, as I shall hereinafter instruct you." Said charge was erroneous in this: That the evidence clearly showed that even if the track was defective such defect in no way brought about the injury or the derailment of the train, but that such derailment was caused by a drawhead pulling out, and that this drawhead was in proper condition, and that the defendants and none of them were in any way negligent concerning it.

Eighth. The court erred in the following charge, as hereinafter shown: "And, to recapitulate the matter, in your deliberations determine whether the wreck was the result of the bad condition of the track or the defective condition of the drawhead. If you find it was caused by a defective drawhead, find for the defendant-. If you find that it was not that, but was the result of the defective condition of the track, in that cause determine whether or not defendant- used reasonable care to provide a reasonably safe road-bed. If you find that was done by the defendant-, though you find the accident was caused by a defective track, you will find for the defendant-. If you find that the master did not use that care and the accident was the result of the defective condition of the track, plaintiff would be entitled to recover, unless you find that he knew that the track was in bad condition." Said charge was error in this: That the evidence clearly showed that the track, if defective, in no way caused the derailment of the train or brought about the injury,

7 but that the same was caused by means of the drawhead pulling out, and that as to this defendants and none of them were in any way guilty of negligence.

Ninth. The court, after having refused a peremptory instruction to find for the defendants and having charged the jury as above shown, erred in refusing to give the following charge asked by defendants: "In this case, it appearing that no claim of negligence as to a bad track was made until more than one year after plaintiff received his injuries, and that the only claim of liability against the defendants Eddy and Cross was on account of a defective draw-

head and appliances, you are therefore to eliminate from your consideration all testimony as to the condition of the track, and, though you should find said track to have been in bad condition and the wreck caused thereby, you cannot therefore find for plaintiff," because it clearly appeared from the evidence that plaintiff received his injuries on the 1st day of September, 1890; that in his original petition, filed within one year, his only claim of a cause of action against defendants was on account of an alleged defect in the drawhead and its pulling out and striking the track; that he made no claim on account of any defect in the track until the 23d day of August, 1892, more than one year after his injury and the accruel of his right of action, and that therefore his cause of action because of any defect in the track was barred by the statute of limitations.

Tenth. There was error in this, because in this case it appears from the record that the judgment was given for the plaintiff, J. M. Evans, whereas by the laws of the land and under the facts in the case it should have been given for defendants.

Wherefore defendants pray that the judgment aforesaid may be reversed, annulled, and held for naught, and that they may be restored to all the rights and things they have lost by reason thereof.

All of the questions presented by the assignment of errors were duly made in the circuit court, and the adverse rulings thereon are duly shown by exceptions made and saved on the trial.

8 Whereupon, the court desiring the instructions of the honorable the Supreme Court of the United States for the proper decision of the questions arising herein, it is hereby ordered that the following questions and propositions of law be certified to the honorable the Supreme Court of the United States, in accordance with the provisions of section 6 of the act entitled "An act to establish circuit courts of appeals and define and regulate, in certain cases, the jurisdiction of the circuit courts of the United States, and for other purposes," approved March 3, 1891, to wit:

I.

Under the facts of the case, as shown by the pleadings and hereinbefore recited, was the Missouri, Kansas & Texas Railway Company of Texas properly made a codefendant with the receivers, Cross and Eddy?

II.

Under the facts of the case, as shown by the pleadings and hereinbefore recited, had the circuit court of the United States for the eastern district of Texas jurisdiction and authority to try and determine the issues arising on the record between the plaintiff Evans and the defendant The Missouri, Kansas & Texas Railway Company of Texas, and give judgment accordingly?

III.

If the first and second questions or either of them are answered in the negative, has this court, under the writ of error jointly sued out by the receivers, Cross and Eddy, and the Missouri, Kansas &

Texas Railway Company of Texas, jurisdiction and authority to reverse in toto the judgment of the circuit court and direct a dismissal of the case as against the Missouri, Kansas & Texas Railway Company of Texas and award a new trial as against Eddy and Cross, receivers?

9 IV.

In case this court is without authority to reverse the judgment of the circuit court in favor of Cross and Eddy, receivers, the same not having been complained of by the defendant in error, and in case the first two questions herein certified shall be answered in the negative, has this court authority to reverse the judgment of the circuit court and remand the cause with instructions to remand the whole cause back to the State court from which it was originally removed?

It is further ordered that certified copies of the printed record and briefs on file in this case be transmitted with this certificate to the honorable the Supreme Court of the United States.

10 United States Circuit Court of Appeals for the Fifth Circuit.

I, James M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 9 pages, numbered from 1 to 9, inclusive, constitute a true, full, and perfect transcript of the certificate of the said United States circuit court of appeals in the case of H. C. Cross and George A. Eddy, receivers of the Missouri, Kansas & Texas railway, and The Missouri, Kansas & Texas Railway Company of Texas, plaintiffs in error, *v.* J. M. Evans, defendant in error, No. 246, November term, 1894, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 5th day of March, A. D. 1895.

JAMES M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

11 H. C. Cross and Geo. A. Eddy and The Missouri, Kansas and Texas Railway Company of Texas, Plaintiffs in Error,
vs.
J. M. Evans, Defendant in Error.
} Suit Pending in the Supreme Court of the United States.

In this case the following stipulation is entered into:

It appears from the certificate made by the judges of the United States circuit court of appeals for the fifth circuit that the assign-

ments of error certified by them were made by H. C. Cross and Geo. A. Eddy, whereas they were likewise made by the Missouri, Kansas and Texas Railway Company of Texas. Now, for the purposes of avoiding a certiorari to perfect the record, this stipulation is entered into, and it is agreed that said assignments and the questions certified by the circuit court of appeals, in being considered by the Supreme Court of the United States, shall be considered as if it appeared from the certificate of the judges that the assignments were made by the Missouri, Kansas and Texas Railway Company of Texas as well as by H. C. Cross and Geo. A. Eddy.

F. C. DILLARD,
Attorney for Plaintiffs in Error, H. C. Cross and Geo. A. Eddy and The Missouri, Kansas and Texas Railway Company of Texas.
MARTIN L. CLARDY,
Attorney for Defendant in Error, J. M. Evans.

12 [Endorsed:] Case No. 15,891. Supreme Court U. S., October term, 1896. Term No., 268. H. C. Cross *et al.*, receivers, &c., P. E., *vs.* J. M. Evans. Stipulation in regard to assignment of errors. Filed Nov. 17, 1896.

Endorsed on cover: Case No. 15,891. U. S. circuit court of appeals, fifth circuit. Term No., 268. H. C. Cross & George A. Eddy, receivers of the Missouri, Kansas & Texas railway, & The Missouri, Kansas and Texas Railway Company of Texas, plaintiffs in error, *vs.* J. M. Evans. (Certificate.) Filed May 4, 1895.

Supreme Court, U. S.
FILED.
APR 1 1897
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, AND H. C. CROSS AND GEORGE A. EDDY, RECEIVERS OF THE MISSOURI, KANSAS & TEXAS RAILWAY,
PLAINTIFFS IN ERROR,
vs.
J. M. EVANS,
DEFENDANT IN ERROR.
No. 268.

On a Certificate from the United States Circuit Court of Appeals, for the Fifth Circuit.

Brief of Plaintiff in Error, The Missouri, Kansas & Texas Railway Company of Texas, on Certified Questions.

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Nixon-Jones Printing Co., 215 Pine Street, St. Louis, Mo.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, AND H. C. CROSS AND GEORGE A. EDDY, RECEIVERS OF THE MISSOURI, KANSAS & TEXAS RAILWAY,
PLAINTIFFS IN ERROR
vs.
J. M. EVANS,
DEFENDANT IN ERROR.
No. 268.

On a Certificate from the United States Circuit Court of Appeals, for the Fifth Circuit.

Brief of Plaintiff in Error, The Missouri, Kansas & Texas Railway Company of Texas, on Certified Questions.

STATEMENT.

The statement of the case by the Circuit Court of Appeals appears on pages 1 to 7, and the certified questions on pages 7 and 8 of the printed certificate.

Two corporations are mentioned in the record; the Mis-

souri, Kansas & Texas Railway Company, incorporated under the laws of the State of Kansas, and *The* Missouri, Kansas & Texas Railway Company *of Texas*, incorporated under the laws of the State of Texas. For convenience the former corporation will be styled the "Kansas Company," and the latter, the "Texas Company." The Texas Company is a party to the record; the Kansas Company is not.

This suit was originally begun on the 5th of March, 1891, in the District Court of Wood County, Texas, against George A. Eddy and H. C. Cross, receivers of the railway of the Kansas Company, to recover damages on account of personal injuries alleged to have been inflicted on him on the 1st of September, 1890, while the receivers were operating the railway under appointment of the United States Circuit Court for the District of Kansas, and under like appointment of the United States Circuit Court for the Northern District of Texas.

The Kansas Company, at the time of the appointment of the receivers, owned lines of railway in the States of Missouri, Kansas and Texas and the Indian Territory, and the receivers were appointed originally in the United States Circuit Court for Kansas and subsequently by the United States Circuit Court for the Northern District of Texas in proper ancillary proceedings. These appointments were made in 1888. The receivers were in possession of and operating the lines of railway in Texas as elsewhere at the time of plaintiff's alleged injury on the line in Texas.

In the suit in the State court the receivers were the only parties defendants.

The plaintiff in his orginal petition grounded the liability of the receivers solely on the allegation that he was injured while working as a freight train brakeman in consequence of the derailment of the train, brought about by the *drawhead of one of the cars pulling out.*

On April the 20th, 1891, the receivers filed in the District Court of Wood County their petition and bond for removal on the ground of diversity of citizenship, the receivers, Eddy and Cross, alleging that they were citizens of Kansas, and the plaintiff a citizen of Texas, and on the further ground that a Federal question was involved; and on the 4th day of May, 1891, the bond was approved, the petition granted and the cause removed to the United States Circuit Court for the Eastern District of Texas.

On the 23d of August, 1892, plaintiff filed his first amended original petition complaining of the said receivers and also of the Texas Company, alleging that since the filing of the suit all properties in the hands of the receivers had passed into the hands of the Kansas Company, and by that company sold under an act of the legislature of Texas to the Texas Company. As an additional ground of negligence to that set out in the original petition, plaintiff for the first time alleged that the derailment of the train was caused *by the track being out of repair and in an unsafe and dangerous condition.*

On the 23d of August, 1893, plaintiff filed his second amended original petition complaining of the said receivers and of The Missouri, Kansas & Texas Railway Company of Texas, alleging the grounds of negligence as in his first amended original petition. It also plead said act of the legislature of the State of Texas, passed April 15th, 1891, entitled:—

"AN ACT

"to authorize the sale and conveyance of the Mis-
"souri, Kansas & Texas Railway Company's lines of
"railroad and properties within this State and certain
"lines of railroad heretofore operated by or as the
"property of the Missouri, Kansas & Texas Railway
"Company or as a part of the system of roads within

"the State known as the Missouri, Kansas & Texas "Railway, and to provide for and authorize the sale, "transfer and conveyance of said lines of railroad to, "and the purchase and operation thereof by a single "corporation, company or association of persons to be "incorporated under the laws of this State, and to "settle and dispose of certain pending suits brought "by the State of Texas against said Missouri, Kansas "& Texas Railway Company, wherein the powers, "privileges and franchises granted it within the State "are sought to be forfeited."

See Special Laws of Texas (1891), p. 120, *et seq.*

The following are the material sections of said act:—

"Section 1. That the Missouri, Kansas & Texas "Railway Company be, and it is hereby authorized "and empowered to transfer, sell and convey all and "singular, the railway property, tracks, side tracks, "depots, rights of way and all properties and property "rights within this State acquired, controlled or held "by it, or in its name, by purchase, construction or "otherwise; and which sale and conveyance to be "made under the power herein given, shall be to some "railway corporation, company or association of "persons, to be incorporated under the laws of this "State, for the purpose of acquiring, owning, main- "taining and operating the railways so purchased as "one property.

"Sec. 2. The sales to and purchase by said Missouri, "Kansas & Texas Railway Company of the several "lines of railway within this State from the railway "companies hereinafter mentioned, and which lines

"have been heretofore operated by or as the property "of the said Missouri, Kansas & Texas Railway Com- "pany, or as a part of the system of railroads within "the State known as the Missouri, Kansas & Texas "Railway, are hereby authorized, approved, ratified "and confirmed, and the consent of the State hereby "given thereto; provided, however, that the con- "firmation and validation of such sales shall not be "operative unless within twelve months after legal "authority is given for the sale to and purchase by a "domestic corporation as contemplated by this act, "the said Missouri, Kansas & Texas Railway Com- "pany shall sell, transfer and convey all and singular "the lines of railway constructed by it within this "State, as well as those acquired or held by it, or in "its name by purchase or otherwise, to some railway "corporation, company or association of persons, to "be incorporated under the general laws of this State, "and which shall be subject thereto, as other railway "corporations organized under the laws thereof.

"Sec. 3. The sale herein authorized to be made, "shall be subject to all just and legal incumbrances, "suits or actions for damages or rights of way, liens, "judgments and debts given, contracted or incurred "by said Missouri, Kansas & Texas Railway Com- "pany, and other companies herein mentioned, upon "or against said properties or any part thereof, as "well as to the payment and discharge of all and "singular the legal obligations and liabilities of every "sort whatsoever against said Missouri, Kansas & "Texas Railway Company, and properties herein "mentioned, and for all debts, judgments, suits, "and all claims for damages against the receivers "of said Missouri, Kansas & Texas Railway Com-

"pany to the same extent that said property
"would be liable therefor if the property remained
"in the possession and control of said Missouri,
"Kansas & Texas Railway Company, and the purchas-
"ing company or corporation, shall take the same,
"charged therewith, and subject to the payment
"thereof, and the assumption of such purchasing
"company or corporation of such incumbrances, debts
"and liabilities may enter into and constitute a part
"of the consideration for such sale and conveyance
"thereto, but the property of the new company in
"Texas shall not, as between the vendor company and
"the new corporation, be liable for more than its pro-
"portional part of such debts and incumbrances
"ascertained upon a basis of mileage in this State as
"compared with the mileage of the whole system,
"and the capital stock of such new corporation,
"when formed, may be issued for such property as
"additional consideration therefor, and on such terms
"as may be agreed upon, for the stock of the several
"herein named corporations, organized under the laws
"of this State, whose stock shall be thereupon can-
"celed and extinguished, and the stock of the pur-
"chasing corporation issued in conformity with the
"constitution and general laws of this State and with
"the provisions of this act, may be held by the trustee
"or trustees of the mortgage bondholders, their suc-
"cessors or assigns in trust, for the holders of the
"Missouri, Kansas & Texas Railway Company and
"their assigns, as, and with the powers conferred by
"the laws of this State on an individual stockholder;
"provided that the stock authorized to be issued above
"shall not exceed ten thousand ($10,000) dollars on
"each mile of completed railway acquired under the
"provisions of this act.

Under the authority of this act and other laws of Texas a corporation known as The Missouri, Kansas & Texas Railway Company of Texas, being the Texas Company, the defendant, was formed October 28th, 1891, and on November 18th, 1891, the lines of railway of the Kansas Company in Texas, by proper deed, were conveyed to the Texas Company.

On the 14th day of September, 1893, The Missouri, Kansas & Texas Railway Company of Texas, having been served, filed its original answer. It excepted to the maintenance of the suit against it because it appeared from plaintiff's petition that both it and plaintiff were citizens of the State of Texas, and that therefore the court did not have jurisdiction of it. It also raised the same question by answer in pleading to the merits. This defendant excepted to so much of said petition as sought to recover on account of any *defects in track* because more than one year had elapsed between the receiving by plaintiff of his injuries and the setting out of any cause of action based upon this ground. It further pleaded that plaintiff's injury was caused from accident in no way brought about by any negligence of the receivers; that if there was any negligence upon the part of any one it was upon the part of the plaintiff alone. It further pleaded that the drawheads were in good condition; that the car handled by it was a foreign car; that the receivers had had the drawheads subjected from time to time to close inspection, and that such inspection failed to show any defect. It further pleaded that if plaintiff had any cause of action it arose against Eddy and Cross while they were opperating the Missouri, Kansas & Texas Railway as receivers; that about the 9th day of June, 1888, in a suit in equity pending in the United States Circuit Court of Kansas and by ancillary proceedings in the United States Circuit Court for the Northern District of Texas, George A. Eddy and H. C. Cross were appointed

receivers of the Missouri, Kansas & Texas Railway, and all properties of the Kansas Company, were turned into their hands; that on the 1st day of July, 1891, by virtue of an order of said United States Circuit Courts all property in the hands of said receivers was by them turned over to the Kansas Company, not the Texas Company, and that said George A. Eddy and H. C. Cross were then discharged as receivers of said property; that said courts retained jurisdiction of said properties and of said pending litigation for the purpose of enforcing against said receivers and said property such claims as might be presented to and allowed by them; that it was further provided in the orders discharging said receivers that all persons having claims against them by reason of causes of action arising during the receivership should present the same on or before the 1st day of January, 1892, and in event of their failure to do so their rights should cease and determine. It further appeared from the pleading that Eddy and Cross had been fully and finally discharged as receivers on July 17th, 1892, and that due notice by publication requiring persons having claims against the receivers to intervene had been given. It was further pleaded that plaintiff well knew of such orders and decrees, but failed and refused to intervene. It was admitted that plaintiff knew of these orders.

On the 14th of September, 1893, the receivers, Eddy and Cross, adopted the answer of the Texas Company, it and they pleading the discharge of the receivers. On the 8th of January, 1894, the defendants' demurrers, both as to the jurisdiction and the merits, were overruled. The case was tried before the jury and on the 11th day of January, 1894, resulted in a verdict and judgment for plaintiff and against the Texas Company for $7,500.00, but discharging Cross and Eddy, receivers. Bill of exceptions was duly saved, filed and approved by the court within the

time allowed. On the 20th of February, 1894, writ of error was allowed to the receivers and to the Texas Company. In the pleadings no allegations were made as to any betterments being made on the road while in the hands of receivers, and no proof or evidence was offered as to any. On the trial of the case it appeared that Eddy and Cross had been finally discharged as receivers on the 17th of June, 1892, and the court directed a verdict for them.

There was no exception taken by the plaintiff to the action of the Circuit Court in rendering judgment in favor of the receivers, and no appeal or writ of error prosecuted by the plaintiff from such judgment in favor of the receivers. The receivers and the Texas Company sued out writ of error from U. S. Circuit Court of Appeals and joined in an assignment of errors in the Circuit Court of Appeals, but these assignments of errors complained only of the act of the Circuit Court in rendering judgment against the Texas Company. These assignments of error appear at pages 4 to 7 of the Printed Certificate, and among others assigned the following as errors of the Circuit Court: —

1. In assuming jurisdiction of the Texas Company.

2. In holding that it had jurisdiction to render a judgment against the Texas Company.

3. In not finding for the Texas Company on the ground that there were no allegations and no proof that betterments or improvements had been made by the receivers on the railway of the said company which it had purchased from the Kansas Company.

4. In not peremptorily directing a verdict for the Texas Company.

5. In not holding that plaintiff's claim was barred by the Texas statute of limitation which was in force at the time plaintiff received his injuries and continued in force to the time of the trial, and which statute was in words as follows:—

> "Article 3353 (3202). There shall be commenced "and prosecuted within one year after the cause of "action shall have accrued and not afterward all "actions or suits in courts of the following descrip- "tion;
>
> "1. Actions for injuries done to the person of an- "other.

* * * * * * * * * * *

See Revised Statutes of Texas, 1895, page 649.

All the questions presented by the assignments of error were duly made in the Circuit Court and the adverse rulings thereon duly shown by exceptions made and saved on the trial.

The case was argued before and submitted to the Circuit Court of Appeals on the propositions contained in the assignments of error, and that court having the same under consideration evidently concluded the judgment should be reversed, and desiring the advice of the Supreme Court as to what disposition should be made of the case by the Circuit Court after reversal, certified it to this court for its opinion upon the following questions:—

I.

> "Under the facts of the case, as shown by the "pleadings and hereinbefore recited, was the Mis- "souri, Kansas & Texas Railway Company of Texas "properly made a codefendant with the receivers, "Cross and Eddy?"

II.

"Under the facts of the case, as shown by the pleadings and hereinbefore recited, had the Circuit Court of the United States for the Eastern District of Texas jurisdiction and authority to try and determine the issues arising on the record between the plaintiff, Evans, and the defendant, The Missouri, Kansas & Texas Railway Company of Texas, and give judgment accordingly?"

III.

"If the first and second questions or either of them are answered in the negative, has this court, under the writ of error jointly sued out by the receivers, Cross and Eddy, and the Missouri, Kansas & Texas Railway Company of Texas, jurisdiction and authority to reverse in toto the judgment of the Circuit Court and direct a dismissal of the case as against the Missouri, Kansas & Texas Railway Company of Texas and award a new trial as against Eddy and Cross, receivers?"

IV.

"In case this court is without authority to reverse the judgment of the Circuit Court in favor of Cross and Eddy, receivers, the same not having been complained of by the defendant in error, and in case the first two questions herein certified shall be answered in the negative, has this court authority to reverse the judgment of the Circuit Court and remand the cause with instructions to remand the whole cause back to the State court from which it was originally removed?"

The Circuit Court of Appeals further ordered that certified copies of the printed record and briefs on file in this case be transmitted with their certificate to this court, which has accordingly been done and are now on file here.

By way of summary, we give the dates of the events shown by this record in their chronological order:—

1. Plaintiff was injured November 1st, 1890.
2. His suit against the receivers alone, grounding their liability on account of derailment of train by reason of defective car, was begun in the District Court of Wood County, Texas, on March 5th, 1891.
3. Petition and bond of receivers for removal to United States Circuit Court filed in State court on April 20th, 1891, and order for removal made by that court on May 4th, 1891.
4. April 15, 1891, the act of the Texas legislature authorizing the Kansas Company to sell its lines of railroad in Texas to a Texas Company to be thereafter organized, was passed.
5. By order of the United States Circuit Court of June, 1891, the receivers were directed to turn over the railroads in their charge to the Kansas Company on July 1st, 1891, and claimants against the receivers were required to intervene by January 1st, 1892, or their claims should cease and determine.
6. On July 1st, 1891, the receivers delivered the lines of railroad of the Kansas Company in Missouri, Kansas and Texas and the Indian Territory to the Kansas Company.
7. On November 28th, 1891, the Texas Company was formed, and on November 18th, 1891, the lines of railway of the Kansas Company were conveyed to the Texas Company.
8. On the 17th day of July, 1892, the receivers were

finally discharged by the orders of the United States Circuit Courts of Kansas and Texas.

9. Plaintiff's first amended petition mentioning the Texas Company as a party defendant but not properly naming it, and first alleging that his injuries resulted by reason of defective track, was filed August 23d, 1892.

10. The plaintiff's second amended original petition was filed August 23d, 1893, and attempted to make the Texas Company a party defendant, and the Texas Company was served and sought to be brought into court under that petition.

11. The first appearance of the defendant, The Missouri, Kansas & Texas Railway Company of Texas, was September 14th, 1893, at which time it properly demurred and excepted to the jurisdiction of the United States Circuit Court.

12. Judgment was rendered by the United States Circuit Court January 11th, 1894.

13. Writ of error by Texas Company and receivers to United States Circuit Court of Appeals was properly allowed and sued out February 20th, 1894.

14. The Circuit Court of Appeals certified the case to this court February 25th, 1895.

As the plaintiff's suit is stated in full in his second amended original petition filed August 23d, 1893, and it was to that petition only that the Texas Company was made a party by service and appearance, we deem it important that this court should examine that petition. It is found in full on pages 21 to 31 of the record of the Circuit Court accompanying the certified questions of the Circuit Court of Appeals. Its material allegations are: —

1. The plaintiff was a citizen of Texas, and the defendant, the Texas Company, a corporation organized

and existing under the laws of Texas, and therefore a citizen of Texas, and the plaintiff was injured while in the employ of the receivers of the Kansas Company, who were appointed as such by the United States courts for the Districts of Kansas and Texas, by reason of the derailment of a train caused by the negligence of the receivers in not keeping the track in repair.

2. The receivers since the injury and since the commencement of the suit in the State court and its removal to the Federal court, had turned over the railroads in their charge in Texas and elsewhere to the Kansas Company under orders of the United States courts appointing them.

3. The Kansas Company had sold and delivered its lines of railroad in Texas to the Texas Company under authority of the act of the legislature of Texas of April 15th, 1891, which, in section 3, provided that the Texas Company should be subject "to the payment and discharge of all and singular the legal obligations and liabilities whatsoever against said Missouri, Kansas and Texas Railway Company (the Kansas Company) and properties herein mentioned, and for all debts, judgments, suits and all claims for damages against the receivers of said Missouri, Kansas and Texas Railway Company (Kansas Company) to the same extent that the property would be liable therefor if the property remained in the possession and control of the Missouri, Kansas & Texas Railway Company (Kansas Company), and the purchasing company or corporation shall take the same charged therewith and subject to the payment thereof."

4. Nothing was alleged showing any liability of the Kansas Company for plaintiff's claim further than that it was the owner of the railroad which the receivers were operating.

5. No allegations were made to the effect that the receivers had used any of the proceeds which they had received from operating the railway, in improving or bettering the condition of the railway.

6. There was no allegation of any order of the Federal court making the Kansas Company responsible for the plaintiff's claim.

7. So far as appears from the allegations the only ground of liability of the Kansas Company was the fact that it was owner of the railroad at the time the receivers committed the injuries for which plaintiff sued.

8. The only ground of liability of the Texas Company was the provision of the special act of the legislature of Texas authorizing the sale by the Kansas Company to the Texas Company, and providing that the Texas Company should be liable for claims against the receivers to the same extent only that the Kansas Company was liable.

ARGUMENT.

In considering the jurisdictional question it is important that this court should understand the status of the case at the time the jurisdiction of the United States court was invoked against the Texas Company by the plaintiff's second amended original petition. Long before that time the receivers had turned over the railways in their charge, under orders of the Federal courts appointing them, to the Kansas Company, and that company had sold and delivered its lines in Texas to the Texas Company, and the receivers had been finally discharged by the courts which originally appointed them.

By the discharge of the receivers the case pending against them in the United States court by removal from the State court was abated.

Trust Co. *v.* Ry., 7 Fed. Rep. 537 (*s. c.* 2d McCrary, 181);
Davis *v.* Duncan, 19 Fed. Rep. 477;
White *v.* Ry., 52 Iowa, 97;
Telegraph Co. *v.* Jewett, 115 N. Y. 168.

The doctrine of abatement as applied to receivers is well stated by the Court of Appeals of New York in the case last cited as follows:—

> "Obviously after the receiver has been discharged
> "and the property by the action of the court has all
> "been taken out of his hands there can be no propriety
> "whatever in any further proceedings against him,
> "because thereafter he ceases to represent any one;

"he can no longer act for or represent the company
"or its creditors or any other person interested in the
"property and manifestly the court could not there-
"after make an order that he should pay a creditor
"he no longer having any funds out of which pay-
"ment could be made (F. L. & T. Co. *v.* Cent. Ry.,
"2 McCrary, 181). It would be a very singular pro-
"ceeding to permit a creditor to litigate his claim
"with a person who was formerly receiver but who
"has ceased to be such and who is no longer the
"officer or agent of the court or subject to its con-
"trol."

In Pendleton *v.* Russell, 144 U. S., page 640, the general doctrine relating to abatement of suits where the defendant has passed out of existence is stated to be that the suit ceases to be a pending suit, and any judgment subsequently rendered against the defendant is absolutely null and void, and it was held that a judgment against a corporation that had been dissolved pending the suit was void.

The rule at common law is that when an action abates the whole proceeding ends. (Green *v.* Watkins, 6th Wheaton, 261.) The abatement takes place at the time the defendant passes out of existence and not at the time of the suggestion of the event causing the abatement, or the order of the court reciting the abatement. The abatement takes place when the defendant passes away and not by virtue of the record which evidences that fact. (Meese *v.* City of Fond du Lac, 48 Wis. 324, 328 and 329.)

In Mackers Heirs *v.* Thomas, 7th Wheaton, 530, it was held that a real action for the recovery of real estate abated on the death of the defendant, and that it could not be revived against the heirs by reason of the rule that when an action abates it ceases and determines unless there is a statute authorizing its revival; and it was further held that

the Judiciary Act of 1789, while authorizing a revival of a suit against an executor or administrator, did not authorize such revival against the heirs of the defendant, and the only way the heirs could be reached was by a new action.

Congress has undertaken to regulate the subject of the revival of suits where they have abated, in the Judiciary Act of the 24th of September, 1789 (Revised Statutes of U. S., 2d edition, 1878, Secs. 955–956), but in neither of those sections, nor in any other act of Congress with which we are familiar, has any provision been made for the revival of a suit against any one where receivers have been discharged. Therefore if a cause of action exists against any one by reason of the liability of former receivers a new suit would have to be instituted against such person.

The decision of the Circuit Court in the case at bar in favor of the receivers was on the ground that they having been finally discharged no judgment could be rendered against them. Neither party has appealed from that decision, and it is, therefore, the law of this case.

We shall now proceed to consider the plaintiff's suit against the Texas Company as set forth in his 2nd original amended petition.

The Circuit Court had no jurisdiction unless this suit was one arising under the constitution or laws of the United States or was between citizens of different States.

Whether we consider the suit as brought originally in the Circuit Court or as removed there — from the State court — the result is the same.

If the Circuit Court had jurisdiction such jurisdiction could only be acquired under Section 1 or 2 of the Judiciary Act of Mch. 3rd, 1875, as amended by acts of March 3rd, 1887, and August 13th, 1888. Original jurisdiction could not be assumed under the first section unless the suit arose under the constitution or laws of the United States, and jurisdiction by removal under the second section could be

had only if it could have been originally obtained under the first section.

The second section expressly provides for removal only of those suits of which the Federal court would have had jurisdiction by the first section.

From the face of plaintiff's petition it clearly appears that the suit against the Texas Company does not arise under the laws of the United States. The recent decisions of this court authoritatively determine that in a suit brought originally in the Federal court when jurisdiction is not invoked by reason of diverse citizenship it must affirmatively and clearly appear on the face of the petition itself that the suit arises under the laws of the United States (Tennessee *v.* Bank, 152 U. S. 454), and that a suit originally brought in the State court can not be removed to the Federal Court on the ground that it arises under the laws of the United States unless that fact appears from the face of the petition unaided by any averments in the petition for removal or subsequent pleadings (Oregon Short Line R'y *v.* Skottowe, 162 U. S. 495). See to same effect Chappel *v.* Waterworth, 155 U. S. 102; East Lake Land Co. *v.* Brown, 155 U. S. 488; Postal Tel. Cable Co. *v.* Alabama, 155 U. S. 482.

Further, the petition must contain facts upon which a Federal question is based and not mere conclusions. (Carson *v.* Dunham, 121 U. S. 422.)

We contend that there is nothing in plaintiff's petition showing that its suit against the Texas Company in any way arises under the laws of the United States. It seeks to recover of the Texas Company on these grounds: (1) The liability of the receivers under the Texas law relating to negligence. (2) The liability of the Kansas Company by reason of the Texas general, not statutory, law for claims against the receivers. (3) The liability of the Texas Company under the Texas statute by which it purchased the

Kansas Company's railroad for claims against the receivers to the same extent the Kansas Company would have been liable had it not sold its lines in Texas to the Texas Company.

That all of these questions presented against the Texas Company are questions of State law is conclusively settled in the case of Johnson *v.* The Texas Pacific Railway Co. (151 U. S. 81). In that case suit was brought by the plaintiff in the State court against the Texas & Pacific Company to charge it for liability for a claim against the receivers, and there was no removal of the case to the United States court, but it reached this court through writ of error to the Supreme Court of Texas. The Texas court decided that the Texas & Pacific Railway Company was liable for the claim on the ground that during the receivership a large amount of the net earnings had been applied to the improvement and betterment of the railway property and therefore the railway company took the property charged with the obligation to pay plaintiff's claim, and although the order of the court under which the railway was delivered by the receivers to the railway company made the company responsible for all claims against the receivers and was plead and relied on by the plaintiff, yet this court held that the questions presented by the plaintiff's petition were questions of general law not arising under the constitution or laws of the United States, and that the decision of the Supreme Court of the State was final and conclusive, though this Court might have held a different doctrine from what was held by that court.

In the case at bar the plaintiff's petition claims nothing against the Texas Company by virtue of any order of the Federal court, but even if it did the case would not be one arising under the laws of the United States. (Providence Life Assurance Society *v.* Ford, 114 U S. 635.) In that case it was expressly held that a suit in the State court on

a judgment of a Federal court was not one arising under the laws of the United States and could not be removed. The court in the course of its opinion, at page 641, said:—

> "It is suggested, however, that a suit on a judg-
> "ment recovered in a United States court is nec-
> "essarily a suit arising under the laws of the United
> "States, as much so as if the plaintiff or defendant
> "were a corporation of the United States; and hence
> "that such a suit is removable under the act of March
> "3, 1875.
>
> "It is observable that the removal of the cause was
> "not claimed on any such broad ground as this; but,
> "so far as the character of the case was concerned,
> "only on the ground that the defendant had a defense
> "under Rev. Stat., § 739, specifying what the defense
> "was; and we have already shown that that ground
> "of removal, as stated in the petition, was insufficient.
> "But conceding that the defendant is now entitled to
> "take its position on the broader ground referred to,
> "is it tenable and sufficient for the purpose?
>
> "What is a judgment, but a security of record
> "showing a debt due from one person to another? It
> "is as much a mere security as a treasury note, or a
> "bond of the United States. If A. brings an action
> "against B., trover or otherwise, for the withholding
> "of such securities, it is not therefore a case arising
> "under the laws of the United States, although the
> "whole value of the securities depends upon the fact
> "of their being the obligations of the United States.
> "So if A. have title to land by patent of the United
> "States and brings an action against B. for trespass
> "or waste, committed by cutting timber, or by min-
> "ing and carrying away precious ores, or the like, it
> "is not therefore a case arising under the laws of the

"United States. It is simply the case of an ordinary "right of property sought to be enforced. A suit on "a judgment is nothing more, unless some question "is raised in the case (as might be raised in any of "the cases specified), distinctly involving the laws of "the United States — such a question, for example, "as was ineffectually attempted to be raised by the "defendant in this case. If such a question were "raised, then, it is conceded, it would be a case aris- "ing under the laws of the United States.

"These considerations show a wide distinction, as it "seems to us, between the case of a suit merely on a "judgment of a United States court, and that of a suit "by or against a United States corporation; which lat- "ter, according to the masterly analysis of Chief Jus- "tice Marshall in *Osborn* v. *Bank of the United States*, "9 Wheat. 738, is pervaded from its origin to its close "by United States law and United States authority."

The foregoing case was approved in Metcalf *v.* Watertown, 128 U. S. 586, where the court held:—

"The fact that a suit is brought to recover the "amount of a judgment of a court of the United States, "does not, of itself, make it a suit arising under the "constitution and laws of the United States.

"Where the original jurisdiction of a Circuit Court "of the United States is invoked upon the sole ground "that the termination of the suit depends upon some "question of a Federal nature, it must appear at the "outset, in order to give the court jurisdiction, that the "suit is one of which the court, at the time its jurisdic- "tion is invoked, can properly take cognizence."

And in the further course of its opinion, the court said :—

> " And whether that court had or had not jurisdiction,
> " is a question which we must examine and determine,
> " even if the parties forbear to make it, or consent
> " that the case be considered upon its merits."

In Albright *v.* Teas, 106 U. S. 613, *et seq.*, it was held that a suit brought to recover moneys due under a contract for transferring certain letters-patent, was not a case arising under the laws of the United States, and the suit having been removed to the United States Circuit Court was remanded by the Circuit Court, which action was affirmed by this court. This case is affirmed and followed in Marsh *v.* Nichols Shepard & Co., 140 U. S. 344, where this question is fully considered and the decisions of this court thereon reviewed.

If, as we have attempted to demonstrate, the suit of plaintiff against the Texas Company was not one arising under the laws of the United States within the meaning of the Judiciary Act, it is too clear to be the subject of argument that the Circuit Court had no jurisdiction by reason of citizenship of the parties. The plaintiff's petition shows on its face that the plaintiff and the Texas Company were each citizens of Texas, and even if the receivers were citizens of Kansas and codefendants with the Texas Company the controversy would not be between citizens of different States. It is absolutely settled by this court that neither original jurisdiction nor jurisdiction by removal exists in the Federal court on the ground of diverse citizenship unless all of the defendants are citizens of another State or other States than that of the plaintiff.

Cnt. Ry. of N. J. *v.* Mills, 113 U. S. 249.

We deem it unnecessary to cite the multitude of cases on this point.

For the reasons which we have suggested the Circuit Court should not have assumed to have exercised jurisdiction in the plaintiff's suit against the Texas Company. At all events, when the Circuit Court found that the receivers had been discharged and the plaintiff's suit against them had abated, and directed a verdict and judgment for the receivers, it should then have dismissed the suit as against the Texas Company in plain obedience to the requirements of section 5 of the Judiciary Act of 1875 as amended by the act of March 3d, 1887, which section reads as follows:—

> "5. That if, in any suit commenced in a circuit "court, or removed from a State court to a circuit "court of the United States, it shall appear to the sat- "isfaction of said circuit court, at any time after such "suit has been brought or removed thereto, that such "suit does not really and substantially involve a dis- "pute or controversy properly within the jurisdiction "of said circuit court, or that the parties to said suit "have been improperly or collusively made or joined, "either as plaintiffs or defendants, for the purpose of "creating a case cognizable or removable under this "act, the said circuit court shall proceed no further "therein, but shall dismiss the suit or remand it to "the court from which it was removed, as justice may "require, and shall make such order as to costs as "shall be just."

The plaintiff's suit against the receivers was a distinct suit from that against the Texas Company, for that against the receivers arose in tort while that against the Texas Company arose out of a contract of that company with the Kansas Company to pay any claims against the receivers that the Kansas Company would have been liable for. The right of the Texas Company not to be sued in a Federal

court in a case against it in which its liability does not arise under the constitution or laws of the United States is sacred. Even if the case was one under the decisions of the Texas courts in which the receivers and the Texas Company could be joined as defendants, yet we submit such joinder could not be had in the Federal court if the cause of action against the Texas Company when stated alone did not contain all the elements of a suit arising under the laws of the United States such as would have made it liable to suit in the Federal courts alone. To illustrate our views, suppose this kind of case: The Missouri Pacific Railway Company, a Missouri corporation, and the Union Pacific Railway Company, a corporation organized under the laws of Congress, by a collision, through the mutual and concurring negligence of both companies, injures a passenger, so that he would have a joint and separate cause of action against both. In such case both companies could be joined as defendants in suit in a State court. The Union Pacific Company, a Federal corporation, could be sued in a Federal court. Could the Union Pacific and Missouri Pacific companies be joined in a suit in the Federal court? We claim not. The Missouri Pacific Company could not be sued in the Federal court. It could not be divested of its rights not to be sued in the Federal court, for its liability in no way arose under the laws or constitution of the United States. In the case supposed the plaintiff could resort to the United States court as against the Union Pacific, for it is a corporation organized and existing under the laws of the United States, and for that reason alone a suit against it would be cognizable in the Federal court. In the case at bar there is no original joint and several liability of the receivers and the Kansas Company and the Texas Company. The liability of the receivers first arose by the commission of the injuries if they were negligently committed. The liability of the Kan-

sas Company if any arose by subsequent acts of the receivers and the Kansas Company to which the plaintiff was not privy. The liability of the Texas Company if any arose out of an independent contract between it and the Kansas Company by which it purchased the Kansas Company's lines in Texas, and to that contract the plaintiff was not a party. So the cause of action against the receivers and the cause of action against the Texas Company were separate and distinct, and even if under any system of pleadings they could be joined in a court which had jurisdiction of both causes of action and all of the parties, still the suits were separate and could not be cognizable by a court which had jurisdiction over only one of the suits and one of the defendants.

In the language of Mr. Justice Field in Coal Co. *v.* Blatchford, 11 Wall. 172 (quoted approvingly by Mr. Justice Miller in Lyon *v.* Smith, 133 U. S., p. 319), speaking for this Court and with reference to the Judiciary Act: "If there are several coplaintiffs the intention of the act is that each plaintiff must be competent to sue and if there are several codefendants, each defendant must be liable to be sued or the jurisdiction cannot be entertained."

Before concluding our argument we deem it not improper to add something on the merits of this case though this court should not pass upon anything save the judisdictional questions. It might be concluded should we remain silent on the merits that we conceded that the plaintiff's petition stated a cause of action under the Texas law against the Texas Company.

A doctrine has been established in Texas, by recent decisions of the Supreme Court of that State, to the effect that when a road passes out of the hands of receivers without a sale to the owning company, and the receivers have

applied the earnings which they received during the time the road was in their hands to the improvement and betterment of the road, then upon proper allegations and proofs the owning company can be held responsible for claims against the receivers to the extent of the amount expended for such betterments and improvements. The following are the cases referred to:—

Hicks *v.* Railway Company, 62 Tex. 38;
Ryan *v.* Hays, 62 Tex. 42;
Texas & Pacific Ry. Co. *v.* Johnson, 76 Tex. 421; (*s. c.* 151 U. S. 81);
Adams *v.* Railway Company, 78 Tex. 372;
Railway Co. *v.* Huffman, 83 Tex. 286;
M., K. & T. Ry. Co. *v.* McFadden, 33 S. W. Rep. 853 (Sup. Ct. Texas, decided January 27, 1896).

These cases each and all expressly recognize the doctrine that the owning company is not responsible for claims against the receivers on the theory that the receivers were their agents or representatives, but on the contrary that the company is not, as a matter of general law, personally responsible for claims against the receivers. In the last case above cited, M. K. & T. Ry. Co. *v.* McFadden, the court says:—

"It was held in the case of Railway Co. *v.* Johnson, "76 Tex. 421; 13 S. W. 463, and in subsequent cases, "that where a railroad had been placed in the hands "of a receiver, and had been operated by such receiver "at a profit, and net earnings in an amount sufficient "to pay the claims incurred by the receiver as operat- "ing expenses had been invested in betterments upon "the property, and the road had been returned to the "company, the latter was liable for such claims,

"When a court of equity takes charge of a railroad, "and causes it to be operated, it holds the operating "expenses a first charge upon the earnings of the road; "and, since the lien follows the fund, if it be paid out "upon improvements upon the road, and such ex- "penses remain unpaid, the property becomes charged "with their payment. In the case of Railway Co. *v.* "Gay, 86 Tex. 571; 26 S. W. 599, and in the same "case in 30 S. W. 543, it was also held that when a "receiver takes charge of a railroad under a void "judgment, with the connivance of the company, the "latter will be responsible for the torts committed by "his servants in operating the road. Further than "this, this court has never gone. A receiver is the "agent of the court, and not the agent of the owner "of the property which is placed in his charge; and "it is well settled as a general rule, that the owner is "in no manner responsible for the receiver's acts. "The court appointing a receiver to take charge "of and control a railroad may make the liabilities "incurred by him a charge upon the corpus of the "property, and, upon sale, may direct their payment "from its proceeds. Ellis v. Water Co., 86 Tex. "109; 23 S. W. 858. But the charge so created pro- "ceeds from the order of the court, and does not arise "by operation of law. It is to be presumed that the "receivers in question were properly appointed, and "we cannot hold that from the mere fact that upon "their discharge the company took charge of its "property, it made itself liable either for a breach of "their contracts or for their torts."

The foregoing decision by the Supreme Court of Texas has been made since the case at bar was certified to this court by the Circuit Court of Appeals, and grew out of

the same receivership involved in the case at bar. Under the doctrine thus authoritatively established as the Texas law, it is clear that there is nothing in the record which shows any liability of the Kansas Company for the plaintiff's claim, and of course, under the special Texas statute, there can be no liability of the Texas Company unless the Kansas Company was liable.

The cause of action set up by plaintiff against the Texas Company and upon which he recovered judgment against it was barred by the Texas statute of limitation.

As will have been seen, the plaintiff first sought to recover against the receivers alone on the sole ground that the receivers took into the train upon which he was brakeman a *defective car;* that by reason of such defective car one of its draw-heads pulled out, derailing the car upon which he was at the time riding. Afterwards, and on the 23d day of August, 1892 (one year and four months after his injury), plaintiff filed his first amended original petition against the receivers in which he alleged for the first time that his injury resulted from the fact that

> " the railroad track at the point where the cars were de-
> " railed was out of repair and in an unsafe and danger-
> " ous condition, that the rails were old and worn, the
> " fish-plates without bolts and partially unfastened,
> " the spikes which should hold the rails were loose and
> " easily turned and bent from their proper places, the
> " ties decayed, in a rotten condition and crumbled to
> " pieces under the slightest pressure ; that the road-bed
> " was soft, uneven and beaten down so as to produce
> " an unsafe track and that said train of cars upon
> " which plaintiff was riding was overturned by reason
> " of said bad and defective condition of said road-bed

"ties, fish plates and rail and each and all of "them. * * * That the defective and bad condi- "tion of said road-bed and appurtenances was caused "by and through the negligence and carelessness of "the defendants and through no want of care and "prudence on the part of plaintiff and that all of his "said injuries and damages to him consequent there- "upon were caused by said defective and unsafe con- "dition of said track and road-bed at the place of the "wreck."

The Texas Company was not properly named as a defendant in this first amended original petition and was never served with summons thereunder and never appeared.

Plaintiff filed his second amended original petition against the receivers and the Texas Company on August 23d, 1893 (*two years and four months after his injury*), alleging his cause of action the same as in his first amended original petition.

The Texas Company was served under this last petition, and answering (but not waiving its objections to the court's jurisdiction) excepted

"to all that part of plaintiff's second amended orig- "inal petition wherein he attempts to set up negli- "gence on account of the defective condition of rails, "ties or track or otherwise than in having a defective "drawhead because for the first time said matter was "pleaded on the 23d day of August, 1892, and the "accident occurred more than one year before the "filing of said amended original petition and is barred "by the statute of limitation."

And further excepted because that

"any injuries which befell plaintiff happened more

"than one year and more than two years before the "filing of the amended petition herein wherein he at- "tempts to recover on account of any defects in the "road-bed or track, and is barred by the statute of "limitations."

The Texas statutes of limitations require all suits for personal injuries to be brought within *one* (1) *year* from date of their infliction.

This statute was plead and relied on by the Texas Company all the while. The plaintiff on the trial wholly abandoned any claim by reason of a defective car, and offered no evidence whatever even tending to show that his injuries resulted from such cause, and relied wholly upon the bad condition of track, and the court expressly instructed the jury to find for the defendant, the Texas Company, if it determined the accident resulted from a defective drawhead. The court having refused a peremptory charge to find for the defendant, the defendant specially requested the court to instruct the jury as follows:—

"In this cause it appearing that no claim of negli- "gence as to bad track was made until more than "one year after plaintiff received his injuries, and "that the only claim of liability against defendants, "Eddy and Cross, was on account of a defective "drawhead and appliances, you are therefore to elimi- "nate from your conclusions all testimony as to the "condition of the track and though you should find "said track to have been in bad condition and the "wreck caused thereby, you cannot therefore find for "the plaintiff."

This, the court refused to do and the Texas Company duly excepted.

In Union Pacific Railway Company *v.* Wyler, 158 U. S. 285, decided May 20th, 1895, since the case at bar was certified, this court held that: —

> " In an action by an employee of a railroad company
> " against the company, based upon the general law of
> " master and servant, and brought to recover damages
> " for an injury which had happened to the plaintiff in
> " Kansas while on duty there, an amended peti-
> " tion which changes the nature of the claim, and bases
> " it upon a statute of Kansas, giving the employee in
> " such a case a right of action against the company in
> " derogation of the general law, is a departure in plead-
> " ing, and sets up a new cause of action ; and the statute
> " of limitations as applied to such new cause of action
> " treats the action as commenced when the amendment
> " was incorporated into the pleadings, and not as
> " begun when the action itself was commenced."

Under the authority of that case we claim that at the time the plaintiff sued the receivers and the Texas Company that his suit was barred by the Texas statute and that his suit, so far as it was grounded on the alleged negligent act of the receivers in using a defective track, that being the only ground on which he offered testimony and on which his claim was sustained, must be treated as having been begun at the time of filing his amended petitions, which was more than one year after his alleged cause of action arose.

Respectfully submitted,

JAMES HAGERMAN,
T. S. MILLER,
HEAD, DILLARD & MUSE,
Attorneys for The M. K. & T. Ry. Co. of Texas.

SUPREME COURT, U. S.
APR 1 1897
JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 268.

H. C. CROSS and GEORGE A. EDDY, Receivers of the Missouri, Kansas and Texas Railway Company, and the MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY OF TEXAS,

Plaintiffs in Error,

against

J. M. EVANS,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

RUSH TAGGART,

Counsel for Defendant in Error.

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1897.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 268.

H. C. CROSS and GEORGE A. EDDY,
Receivers of the Missouri, Kansas and Texas Railway Company, and the Missouri, Kansas and Texas Railway Company of Texas,
Plaintiffs in error,

AGAINST

J. M. EVANS,
Defendant in error.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

Statement of Facts.

This was an action to recover damages for personal injuries sustained by the defendant in error on September 1st, 1890, while he was in the employ of Cross & Eddy, Receivers of the Missouri, Kansas & Texas

Railway Company. At the time of the injury defendant in error was employed as a brakeman on the Taylor, Bastrop & Houston Branch, which was a part of the Missouri, Kansas & Texas system, and was operated by the above receivers, and the injuries were brought about by the derailing of a train through the negligence of said receivers.

The suit was originally brought in the District Court of Wood County, Texas, on the 5th day of March, 1891, against George A. Eddy and H. C. Cross, Receivers of the Missouri, Kansas & Texas Railway Company. On the 20th of April, 1891, Eddy and Cross filed their petition and bond for removal of said case on the ground of diverse citizenship, Eddy and Cross alleging that they were citizens of Kansas, and on the further ground of a federal question involved, and on May 4th, 1891, the bond was approved, the petition granted and the cause removed to the U. S. Circuit Court for the Eastern District of Texas. On August 23, 1892, defendant in error filed his first amended original petition complaining of Eddy and Cross, Receivers, and also of the Missouri, Kansas and Texas Railway Company, incorporated under the laws of Texas, though he did not give it its full corporate name, in which petition he alleged that, since the commencement of his suit, all the properties in the hands of the receivers had passed into the hands of the Railway Company and set forth additional grounds of negligence upon the part of the receivers. On August 23d, 1893, defendant in error filed his second amended original petition complaining of the receivers and of the Missouri, Kansas and Texas of Texas. While the Railway Company is styled in plaintiff's first amended original petition the "Missouri, Kansas and Texas Railway Com-

pany," it was in truth the Missouri, Kansas and Texas Railway Company of Texas, of which he was complaining, as the petition shows, and this was the company brought before the court.

On April 16th, 1891, the Legislature of the State of Texas enacted a law authorizing the sale and conveyance of the Missouri, Kansas and Texas Railway Company's lines of railroad theretofore operated as the property of the Missouri, Kansas and Texas Railway, and providing for and authorizing the sale and transfer and conveyance of said lines of railway to and the purchase and operation thereof by a single corporation to be incorporated under the laws of the State of Texas. Among other clauses this act contained a provision that the company purchasing the property of the Missouri, Kansas and Texas Railway should be liable for debts and judgments against it and its receivers in the same way that the Missouri, Kansas and Texas Railway itself would have been liable. Under this authorization a corporation known as the Missouri, Kansas and Texas Railway Company of Texas was formed, and the lines of railway of the Missouri, Kansas and Texas Railway, including the Taylor, Bastrop and Houston Railway, were duly conveyed to the Texas Company.

On September 14, 1893, the Texas Company, having been served, filed its original answer and excepted to the maintenance of the suit against it, because it appeared from plaintiff's petition that both it and plaintiff were citizens of the State of Texas. It further pleaded that if plaintiff had any cause of action it arose against Eddy and Cross while they were operating the Missouri, Kansas and Texas Railway as receivers; and that they were appointed receivers about June 9, 1888, in a certain suit brought in

the United States Circuit Court of Kansas and by ancillary proceedings in the United States Circuit Court for the Northern District of Texas, and that on or about the 1st day of July, 1891, by virtue of an order of said United States Circuit Court, all the property in the hands of said receivers was by them turned over to the Missouri, Kansas & Texas Railway Company, not the Missouri, Kansas & Texas Railway Company of Texas, but a corporation of that name formed under the laws of Kansas, and, further, that Eddy and Cross were then discharged as receivers of said property. That said courts retained jurisdiction of said property and of said pending litigation for the purpose of enforcing against said receivers and said property such claims as might be presented to and allowed by them, and that it was further provided in the order discharging receivers that all persons having claims against them by reason of causes of action arising during the receivership should present the same on or about January 1, 1892, and, in the event of their failure to do so, their rights should cease and determine.

On September 14th, 1893, Eddy and Cross adopted the answer of the Missouri, Kansas and Texas Railway Company of Texas, it and they for the first time then pleading the discharge of the receivers. The defendant's demurrers both to the jurisdiction and to the merits were overruled. The case was tried before a jury, and on January 11th, 1894, resulted in a verdict and judgment for plaintiff and against the Missouri, Kansas and Texas Railway Company of Texas for $7,500, dismisssing the action in respect to Cross and Eddy, receivers. Motion for new trial was overruled and subsequently writ of error allowed to Cross and Eddy, Receivers, and the Missouri, Kansas & Texas

Railway Company of Texas. The case was heard by the United States Court of Appeals for the Fifth Circuit on February 25th, 1895, and that court certified to the Supreme Court of the United States the following questions and propositions of law in accordance with the provisions of Section 6 of the act entitled "An Act to establish Circuit Courts of Appeals and define and regulate in certain cases the jurisdiction of the Circuit Courts of the United States and for other purposes," approved March 3, 1891, to wit:

I.

Under the facts of the case, as shown by the pleadings, and hereinbefore recited, was the Missouri, Kansas and Texas Railway Company of Texas properly made a co-defendant with the receivers Cross and Eddy?

II.

Under the facts of the case, as shown by the pleadings, and hereinbefore recited, had the circuit court of the United States for the eastern district of Texas jurisdiction and authority to try and determine the issues arising on the record between the plaintiff Evans and the defendant The Missouri, Kansas and Texas Railway Company of Texas, and give judgment accordingly?

the United States Circuit Court of Kansas and by ancillary proceedings in the United States Circuit Court for the Northern District of Texas, and that on or about the 1st day of July, 1891, by virtue of an order of said United States Circuit Court, all the property in the hands of said receivers was by them turned over to the Missouri, Kansas & Texas Railway Company, not the Missouri, Kansas & Texas Railway Company of Texas, but a corporation of that name formed under the laws of Kansas, and, further, that Eddy and Cross were then discharged as receivers of said property. That said courts retained jurisdiction of said property and of said pending litigation for the purpose of enforcing against said receivers and said property such claims as might be presented to and allowed by them, and that it was further provided in the order discharging receivers that all persons having claims against them by reason of causes of action arising during the receivership should present the same on or about January 1, 1892, and, in the event of their failure to do so, their rights should cease and determine.

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Under the facts of the case, as shown by the pleadings, and hereinbefore recited, was the Missouri, Kansas and Texas Railway Company of Texas properly made a co-defendant with the receivers Cross and Eddy?

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Under the facts of the case, as shown by the pleadings, and hereinbefore recited, had the circuit court of the United States for the eastern district of Texas jurisdiction and authority to try and determine the issues arising on the record between the plaintiff Evans and the defendant The Missouri, Kansas and Texas Railway Company of Texas, and give judgment accordingly?

III.

If the first and second questions, or either of them, are answered in the negative, has this court, under the writ of error jointly sued out by the receivers Cross and Eddy, and the Missouri, Kansas and Texas Railway Company of Texas, jurisdiction and authority to reverse in toto the judgment of the circuit court, and direct a dismissal of the case as against the Missouri, Kansas and Texas Railway Company of Texas, and award a new trial as against Eddy and Cross, receivers.

IV.

In case this court is without authority to reverse the judgment of the circuit court in favor of Cross and Eddy, receivers, the same not having been complained of by the defendant in error, and in case the first two questions herein certified shall be answered in the negative, has this court authority to reverse the judgment of the circuit court and remand the cause with instructions to remand the whole cause back to the State court from which it was originally removed?

I.

Under the facts of this case, as shown by the pleadings and hereinbefore recited, was the Missouri, Kansas & Texas Railway Company of Texas properly made a co-defendant with the receivers, Cross and Eddy ?

In this connection let us first consider the status of the Missouri, Kansas & Texas Railway Company of Texas, hereinafter called the " Texas Company," and its relation to the Missouri, Kansas & Texas Railway Company, hereinafter called the " Kansas Company " and the receivers of the last named company.

The Kansas Company was a corporation of the State of Kansas created in the year 1880 by the consolidation of certain corporations existing under the laws of Missouri and Kansas, and by virtue of certain acts of Congress of the United States and of the legislature of the State of Texas. Among other property the Kansas Company owned and operated the property now belonging to the Texas Company, including the Taylor, Bastrop & Houston Branch.

In the year 1888 a suit in equity was brought in the Circuit Court of the United States for the Districts of Kansas and Northern Texas against the Kansas Company and others for the foreclosure of certain mortgages. Subsequently in that proceeding Cross and Eddy were appointed receivers of all the property of the Kansas Company, including the property now owned and operated by the Texas Company, and also embracing the Taylor, Bastrop and Houston branch. In this foreclosure suit such proceedings were had that

in the year 1891 all the property of the Kansas Company and of which receivers had been appointed was, without foreclosure or judicial sale, redelivered to the Kansas Company by the receivers.

The Texas Company was incorporated under the General Laws of the State of Texas and under an Act of the legislature of Texas of April 16th, 1891, by which act it was provided that the various lines of railroad in the State of Texas operated by the Kansas Company might be sold to a corporation formed under the laws of Texas. In the year 1891 the property, or a portion of the property, including the Taylor, Bastrop and Houston Branch, redelivered by the receivers to the Kansas Company, was, by this latter company, sold and transferred to the Texas Company.

By Sections 2 and 6 of the Act of the Legislature of Texas, approved March 19, 1889, it was provided that

" all judgments recovered against a receiver for causes of action arising during the receivership shall be a preference lien upon all the property in his hands as such receiver superior to the mortgage lien, and if a receiver is discharged pending suits against him for causes of action growing out of and arising during the receivership, the cause of action shall not abate, but may be prosecuted to final judgment against the receiver, and the plaintiff in this action may, if he sees proper, make the party or corporation to whom the receiver has delivered the property in his hands as receiver a party to the suit, and if judgment is rendered in favor of the plaintiff against the receiver, the court shall also enter up judgment in favor of the plaintiff against the party to whom the property was delivered. If the receiver is discharged by the court before all the liabilities of the receiver arising during the receivership are settled in full, then the persons or corporations to whom the receiver delivers the property that was in his hands as receiver shall be liable to persons having claims against such receiver for the full amount of the liabilities. * * * All persons and corporations whose property has been placed in the hands of a receiver by order of

court, and which has not been sold by the receiver, and which property has been delivered back to the original party or corporation without any sale of said property, shall be liable and held to pay all the unpaid liabilities of the receiver in causes of action arising out of and during the receivership and if there are any suits pending against the receiver at the date of discharge on causes of action arising during the receivership, the plaintiff shall have the right to make the party or corporation to whom the receiver delivers the property which was in his hands as receiver a party defendant along with the receiver."

By the provisions of the above-mentioned special act of April 16, 1891, under which the Texas Company was incorporated and received the property sold to it by the Kansas Company, it was provided that the purchasing company (in this case the Texas Company) should take and receive the property sold subject to all liabilities, including suits for damages, incurred by the Kansas Company or its receivers, and that the purchasing company should assume such obligations and liabilities (Special laws of Texas of 1891, p.).

This action was originally brought against the receivers Cross and Eddy, on March 5th, 1891, at which time said receivers were in possession of and operating the property of the Kansas Company, including that portion of the property on which the accident occurred. On August 23, 1892, and subsequent to the incorporation of the Texas Company and the transfer of the property to it, the defendant in error filed his first amended original petition making the Texas Company a co-defendant with the receivers. In this amended petition the Texas Company is not given its proper name, but it appears from the petition that it was in truth the company complained of and it was in fact the company brought before the court.

IT IS OF IMPORTANCE TO DETERMINE WHETHER THE KANSAS COMPANY, IN CASE IT HAD RETAINED THE CONTROL OF ALL THE PROPERTY DELIVERED TO IT BY THE RECEIVERS, AND HAD NOT TRANSFERRED A PORTION OF THE PROPERTY TO THE TEXAS COMPANY, WOULD HAVE BEEN LIABLE FOR A CLAIM OF THIS CHARACTER. THIS BEING PROVED, THE LIABILITY OF THE TEXAS COMPANY NECESSARILY FOLLOWS BY VIRTUE OF THE LAWS OF TEXAS UNDER WHICH IT WAS INCORPORATED.

By the order of court discharging the receivers and directing a delivery of the property to the Kansas Company it was provided that the Kansas Company and those claiming under it should take and receive the property so delivered subject to all claims, demands and liabilities then existing or which might thereafter be made against the receivers arising out of their receivership.

The claim of the defendant in error existed at the time of the entry of this order, and was a liability incurred by the receivers arising out of their receivership, and consequently was assumed by the Kansas Company and those claiming under it by virtue of the terms of the above order.

It is further provided by the same order that jurisdiction of the foreclosure cause was retained by the court for the purpose of ascertaining and adjudicating claims and liabilities of the character described in said order, and it was provided that intervening proceedings for the purpose of establishing such claims should be commenced on or before January 1, 1892, and that after that date "no further intervention shall be permitted in this cause, and the rights of any claimants who shall not on or before that date have commenced intervention proceedings to avail themselves of the remedies

herein provided for their benefit shall cease and determine."

By this order an opportunity was given to those possessing claims of the character described to enforce such claims by availing themselves of the remedy provided by said order on or before a certain date. The order of court, however, did not attempt to direct that unless claimants availed themselves of their remedies before a certain time that their claims would be barred, but what it did direct was that unless claimants availed themselves, before the time fixed by the order, of the remedy therein given to them that their right to that particular remedy would lapse. Their claims would undoubtedly still exist until barred by the Statute of Limitations, but, in order to enforce the same, claimants would have to pursue some other remedy than that laid down by the terms of the order.

By the final decree in the foreclosure suit entered in June, 1892, it was provided that all claims against the receivers not presented by intervention in that cause before January 1st, 1892, as required by the order above referred to should be barred and that the Kansas Company should become possessed of the property free and clear from all such claims. Let us consider whether the effect of this order was to bar the claim of the defendant in error unless presented by intervention before the time in said order mentioned.

In the case of Texas & Pacific Railway Company against Johnson (151 U. S., 81) the action was brought against the Railway Company and its Receiver to recover damages for an injury incurred through the negligence of the receiver appointed in the foreclosure suit in the operation of the railroad in his hands. An

order was entered in the foreclosure suit directing the receiver to turn over the property in his possession to the Texas & Pacific Railway Company, and by the terms of this order it was provided that the property should be delivered subject to and charged with any judgments obtained by intervenors, and that all claims against the receivers "be presented and prosecuted by intervention prior to February 1, 1889, and if not so presented by that date that the same be barred and shall not be a charge on the property of said company." Jurisdiction of the foreclosure cause was retained by the court for the purpose of hearing and adjudicating such claims.

Subsequent to the making of this order, the claimants' petition was amended by making the Texas and Pacific Railway Company a party defendant, and the action was brought in a court other than that having jurisdiction of the foreclosure cause. The case resulted in a judgment of dismissal against the receivers and a verdict against the railroad company.

Chief-Justice FULLER, reading the opinion of the court, says:

"The receiver was about to be discharged and property redelivered to the company. On the one hand the receiver was entitled to protection from liability, and on the other just claims were entitled to be paid. The Circuit Court sought to secure both objects by the terms of the order and the conditions annexed to the acceptance of possession, but did not regard itself as constrained to indefinitely controlling the pendency of the equity proceedings for that purpose. It reserved those proceedings, therefore, for the dispositions of pending interventions and such as might be filed within the time fixed, at the expiration of which the court could not be called on to allow further claims and assert control over the property for their satisfaction. They would thereafter be barred from prosecution under those proceedings.

In this way the Circuit Court recognized and relieved itself from the obligation to see that no injustice resulted from the action which was taken, which action operated to withdraw their claims against the receiver, the security of his bond and possibly of the property. But after February 1, 1889, those who had not intervened would cease to be entitled to resort to the Circuit Court in the equity suits, and would be remitted to such remedies as might be within their reach."

To the same effect is the recent case of Manton vs. The Texas & Pacific Railway Company, decided by this court at the present Term (164 U. S., 636). In that case the action was brought against the Texas & Pacific Railway Company and its receiver to recover for injuries sustained while the road was in the hands of the receiver. Contention was made that the claim was one against the receiver and not against the railroad company, and that the action was barred by the order of court directing that all claims against the receiver, unless presented by intervention before a certain date, should be barred.

Mr. Justice SHIRAS, reading the opinion of the court, says upon this point:

"Undoubtedly if this were a controversy between a party whose claim originated while a railroad was in control of a receiver appointed during a foreclosure suit and a purchaser at a judicial sale decreed under that proceeding, plaintiff's proposition would be a sound one. If the property sequestered had gone to sale and a fund had been thus realized for distribution, then upon notice appropriate to proceedings *in rem* such a claimant would, in the absence of special and unusual circumstances, have been bound by the disposition so made. But the present case is one in which no judicial sale was made and no fund realized for distribution by final decree after notice to and a hearing of those having claims against the fund. It was not the ordinary case of a sale and purchase in which compliance with stipulated conditions forms part of the consideration, and in which the extent of

the burdens assumed is defined. Here the railroad and appurtenances, whose value was largely enhanced during the pendency of the receivership, were returned to the possession of the railroad company, and while it was proper for the court, in order to protect its receiver, to make an order for those who had claims against him to bring them forward for disposition, it by no means follows that the company took back its property free from all claims that may have originated during the receivership. Such might be the case if the claim originated in some personal delinquency of the receiver for which he and his bondsmen could be held responsible; but where the claim was incidental to the ordinary management of the railroad, not attributable to personal misconduct of the receiver, and where the court which had appointed the receiver had not been put in possession of a fund by a foreclosure sale, but had, at the request of the company and its mortgage creditors, restored its property to the railroad company while such a claim was pending, we are unable to conceive that an order of the kind as was made in this case precluded the complainant from enforcing his claim. * * * * * We think that the order in question, fairly interpreted, meant that the court, when about to release the receiver and his bondsmen by a determination of the foreclosure proceedings and a discharge of the receiver, gave an opportunity to those who had claims to present them; but that after February 1, 1889, those who have not intervened would cease to be entitled to resort to the Circuit Court in the equity suit, and would be remitted to such other remedies as might be within their power."

THE FACTS IN RELATION TO THE FORECLOSURE SUIT IN THIS CASE AND ITS TERMINATION BY A RE-DELIVERY OF THE PROPERTY TO THE COMPANY FORMERLY OWNING IT ARE SIMILAR IN ALL RESPECTS WITH THE FACTS RELATING TO THE SIMILAR PROCEEDINGS IN THE FORECLOSURE CASE ON THE TEXAS AND PACIFIC RAILWAY, AND THE OPINION OF THE SUPREME COURT IN THE CASE LAST CITED SEEMS TO FURNISH AN ABSOLUTE DETERMINATION OF THE PROPER CONSTRUCTION TO BE PUT UPON THE FINAL ORDER DISCHARGING THE RECEIVERS OF THE KANSAS COMPANY.

It appears, therefore, by that order that the Kansas Company and those claiming under it, upon taking the property, assumed the liabilities of the character of this claim, and that such liabilities might be enforced in any court of competent jurisdiction and by any proper method within the time fixed by the Statute of Limitations.

2. We have already seen that the Texas Company was formed for the purpose of acquiring a portion of the property so delivered by the receivers to the Kansas Company, and that it subsequently did acquire from the Kansas Company, some time in the year 1891, a portion of the property, including the property upon which injury occurred, and that, subsequently, the Texas Company was made a co-defendant to this action. By section 2 of the act of 1891 (General Laws of 22d legislature of Texas, p. 128), under which act and the special act above referred to the Texas Company was incorporated, it is provided that "every railroad company organized under the preceding section of this act shall take the property so purchased subject to all encumbrances, judgments, claims, suits, claims for damages, claims for right of way against the old company to the same extent that such property would have been liable in the hands of the Railroad Company from which it was purchased, and such new company may be made a party to every suit pending against the company from which it purchased or which may be pending against any receiver of such company to enforce any right."

The claim of the defendant in error arose against the receiver of the Kansas Company and was of the character described in the order directing the receivers to re-

deliver the property to the Kansas Company. Consequently the Kansas Company would have been liable upon this claim and by virtue of the terms of the Acts above referred to providing that the purchasing company should take the property sold subject to all claims for which the property would have been liable in the hands of the company from which it was purchased, the claim, when properly determined, became a liability of the Texas Company, and that company was properly made a codefendant in any action to establish such liability.

3. THE CASE WHEN REMOVED TO THE FEDERAL COURT WAS TRIED ON THE LAW SIDE OF THAT COURT, AND THE COURT HAD THE RIGHT TO GIVE EFFECT TO THE STATUTES OF TEXAS IN ITS DETERMINATION OF THE CASE.

In the case of Cowley vs. R. R. Co., *infra*, the action was originally brought in the territorial court and removed upon petition of defendant to the Circuit Court of the United States, sitting in equity, which court gave effect in its determination of the case to the statutes of the territory. Upon this point the Supreme Court says:

"Although the statutes of a state or territory may not restrict or limit the equitable jurisdiction of the federal courts and may not directly enlarge such jurisdiction, it may establish new rights or privileges, which the federal courts may enforce on their equity side precisely as they may enforce a new right of action given upon their common law side. * * * It was also said in Davis vs. Gray, 16 Wallace, 203-231, that 'a party going into a national court does not lose any right or proper remedy of which he might have availed himself in the state courts in the same locality. The wise policy of the constitution gives him a choice of tribunals.'

"If any action or proceeding in a state court were subject to be defeated or impaired by one of the parties

exercising his statutory right to remove it to a federal court, no one would be safe in instituting such a proceeding in any case wherein by reason of diversity of citizenship or otherwise it might be subject to removal."

THE DEFENDANT IN ERROR LOST NONE OF THE RIGHTS OR REMEDIES TO WHICH HE WOULD HAVE BEEN ENTITLED IN THE STATE COURT BY REASON OF ANY STATUTES OF THE STATE OF TEXAS EXISTING AT THE TIME WHEN HIS ACTION WAS BROUGHT BY REASON OF THE REMOVAL OF HIS CASE UPON THE PETITION OF THE DEFENDANT TO THE FEDERAL COURT.

In the case of Texas & Pacific Ry. Co. vs. Cox, 145 U. S., page 593, the action was brought in the Circuit Court for the District of Texas, and was founded upon a statute of the State of Louisiana, where the injury was inflicted, and it was held by the court that a cause of action founded upon a statute of one state conferring a right to recover damages for the injury resulting in death may be enforced in the court of the United States sitting in another state if it is not inconsistent with statutes or public policy of the state in which the right of action is sought to be enforced. In that case the plaintiff relied solely for her recovery upon the statute of Louisiana, and her final recovery in the Circuit Court for the Eastern District of Texas was based upon the rights conferred by that statute. The statute in that case was held by this court to be applicable to the receivers, although they were receivers appointed by a federal court. For the same reason, irrespective of the court of their appointment, the act of 1889 applies to all receivers and may be enforced against them in any court of competent jurisdiction; and, although that act did not become a law until after the

commencement of the receivership, as it only affected the remedy, it applied to the pending receivership.

Although it may be contended that this act could only be recognized in the state courts, still the transfer of the property in Texas would necessarily be made subject to the provisions of the law of that state and the corporation acquiring such property would take the same subject to the law above cited. If, however, it should be determined that the Texas law does not apply in this case, still the same conditions as to the acquisition of the property redelivered by the receivers are set forth in the order discharging the receivers and directing the delivery of the property entered in the foreclosure suit.

4. IRRESPECTIVE OF STATUTE THE CLAIM OF THE DEFENDANT IN ERROR WAS PROPERLY ENFORCEABLE AGAINST THE TEXAS COMPANY, AND IT WAS NOT NECESSARY TO SHOW BY ANY EVIDENCE THAT THE PROPERTY WAS RETURNED WITH ANY BETTERMENTS PLACED ON IT WHILE IN THE HANDS OF THE RECEIVERS.

Claims of the character of the one in this case have been held by this court to be entitled to a preference over the claims of the mortgage bondholders.

In the case of Cowdrey vs. Railroad Company, 93 U. S., 352, it was held that the earnings of a railroad in the hands of a receiver are chargeable with the value of goods lost in transportation and damages done to property during his management:

Mr. Justice FIELD, delivering the opinion of the court, says:

"The allowance for goods lost in transportation, and for damages done to property whilst the road was in the hands of the receivers, was properly made. The

earnings received were as much chargeable with such loss and damage as they were chargeable with the ordinary expenses of managing the road. The bondholders were only entitled to what remained after charges of this kind as well as the expenses incurred in their behalf were paid."

It is apparent that if the road had remained in the hands of receivers until the final determination of this action that the claim would have been well founded and entitled to a preference out of the funds in the hands of the receivers. The railroad then receiving back its property would have taken it decreased by so much, and the company acquiring the property would not be in position to dispute the allowance of such a claim. In any event and against whatever party final judgment is allowed the effect is the same, and an action brought against the receivers for a liability of this character arising during their operation of the road is more strictly speaking an action against the receivership or funds in the hands of the receivers (see McNulta vs. Lochridge, 141 U. S., p. 327).

It has been held by this court that in an action brought to foreclose a mortgage, a decree of foreclosure and sale having been entered, and the decree confirmed the decree of confirmation provided that the purchasers should take the property subject to all claims of a certain nature which should be presented within a certain time; that as the purchasers did not object to the terms of the decree of confirmation that the court had discretion to abrogate the time limitation, and to decree that the purchaser should take the claim as the receiver had been discharged, Mr. Justice BLATCHFORD, reading the opinion of the court, says:

"Although the decree of sale provided that all claims, debts and demands accruing during the receiver-

ship should be barred, unless presented within six months after the confirmation of the sale, yet the decree of confirmation provided that the purchaser should take the property and that the deed should recite that they took it subject to all debts, claims and demands of whatsoever nature incurred by the receivers, and which might remain unpaid at the termination of his receivership. * * * It was in the discretion of the court to abrogate the six months' limitation " ( ).

In the present case there being no foreclosure sale and consequently no decree of confirmation or deed, it was impossible for the court to provide for the payment of undetermined claims by the ordinary methods exercised in the case of foreclosure and sale. The court, however, recognized the justice and equity of protecting such claims, and did so effectively by the order discharging the receivers and delivering the property to the railroad corporation, by which it is expressly provided that the Railroad Company *and those claiming under it* should take and receive the property so delivered subject to all claims and liabilities then existing or which might thereafter be made against the receivers, and arising during and out of their receivership.

The so-called doctrine of betterments has no application in this case and a careful examination of the cases in which it has been applied will show that in every such case foreclosure sales had taken place and a fund realized, the property being acquired by a new corporation and not restored to its original owner. It is difficult to perceive upon what principles of equity a railroad corporation should be allowed to place its property beyond the reach of creditors and subsequently receive it back without any responsibility for claims arising during its operation by the court for the benefit of the railroad company, even if such operation had been at a loss, no net earnings had been

derived and the property had been restored in an inferior condition to that in which it originally was. In most, if not all, cases in which this doctrine has been applied, the debt involved was one of the old company which was ordered paid out of the current receipts in the hands of the receivers because of a diversion of earnings which should have gone to the general creditors of the old company.

In respect, however, to the debts of the receiver a preference in their payment over the mortgage debt has not been ordered by the courts upon the theory of any diversion of funds by the receiver or any betterments to the property, but because such debts were incurred in the operation and maintenance of the railroad as a going concern and are entitled to be paid out of the earnings of the property, and if these are not sufficient then out of the corpus of the property. Such debts, as has been said by this court in the case of Cowdrey vs. R. R. Co., cited above, should be classed with the ordinary expenses of managing the road. They occupy an altogether different position from the debts incurred by the company prior to the receivership.

In this case the company is not made a party defendant upon any theory of agency upon the part of the receivers, nor on the ground of any contract on its part, but for the reason that by virtue of the laws of Texas, by the provisions of the order in the foreclosure suit turning over the property, and upon the broad, equitable principle, it should take the property coming into its possession charged with the liabilities of the receivers incurred in the operation and maintenance of the road while in their hands, and this seems especially reasonable in a case like the present one

where foreclosure suit was not a hostile proceeding but distinctly for the benefit of the railroad company to which the property was eventually restored by the receivers.

II.

Under the facts of this case as shown by the pleadings hereinbefore recited had the Circuit Court of the United States for the Eastern District of Texas jurisdiction and authority to try and determine the issues arising on the record between the plaintiff Evans and the defendant the Missouri, Kansas and Texas Railway Company of Texas and give judgment accordingly?

1. This action was originally brought in the State Court and was removed to the Federal Court upon petition of the receivers on the ground of diverse citizenship and on the further ground of a federal question involved (Record, p. 2). It is unquestioned that at the time of the institution of this proceeding the Federal Court had jurisdiction and the purpose of the second certified question seems to be to ascertain whether the Federal Court retained jurisdiction of the action after the Texas Company was brought before it as a party defendant and whether the issues between the plaintiff and the Texas Company were properly determinable by the Circuit Court.

The action was prosecuted to its end against all of the defendants, and there was no separable controversy

between the plaintiff and each defendant ; the reason for making the Texas Company a co-defendant being that it had succeeded to the liability of the original defendants, and no final determination of the action could be had without its presence before the court.

The plaintiffs in error assert the claim that after the Texas Company was brought in as a party defendant the action became a controversy between citizens of the same state, and for this reason was not properly triable by the federal court. In this opinion we are not able to concur, for the reasons hereinafter set forth, but even if it were true the fact still remain that this action was removed not only upon the ground of diverse citizenship, but upon the ground that a federal question was involved, and the plaintiffs in error do not show that the federal question was eliminated by the bringing in of the Texas Company as a party defendant.

It further appears that the receivers Cross and Eddy were continued as parties defendant until the final determination of the action, and it does not appear from the record or otherwise that there was a separable controversy between the plaintiff and the Texas Company. It therefore follows that the case still continued to be a controversy between citizens of different states.

The facts of this case show that the federal court properly acquired jurisdiction of the controversy between the plaintiff and Cross and Eddy, Receivers, and in addition that there was no separable controversy between the plaintiff and the Texas Company, but that the latter simply succeeded by a purchase of the property to the liabilities of the receivers contracted in its operation, and we earnestly contend that, in consequence, the jurisdiction of the federal court could not be divested on the ground that the successor in interest

of the original party defendant was a citizen of the same state as the plaintiff.

Although it is acknowledged that this Court has held that at any time during the progress of a cause it may be discontinued or remanded if a want of jurisdiction appears, still we construe this to mean a defect originally existing in the jurisdiction at the time when the case was commenced, and which was subsequently and during the progress of the case discovered, and that it does not mean that in the event that a party is, after the court has acquired jurisdiction, brought in as an additional defendant by reason of his succession to the rights and liabilities of the original defendant, that thereupon the jurisdiction of the Court shall cease. On the contrary, it has often been held by this Court that the substitution of another party who has since the commencement of the suit acquired the interests of the original defendant will in no way affect the jurisdiction of the Court. This principle has been applied to the relationship between landlord and tenant, where the case was originally commenced against the tenant and jurisdiction acquired by the Court, and subsequently the landlord substituted in the place of the tenant (Hardenburgh vs. Ray, *infra*).

An examination of the cases in which it has been held that the substitution or addition of a party defendant after the commencement of the suit would defeat jurisdiction as to such additional party shows that in all such cases a separable controversy existed between the plaintiff and the substituted or additional defendant.

In the present case the additional defendant (the Texas Company) stood in close relations of privity with the original defendants by reason of the transfers

of the property to it and the statutes, subject to which the Texas Company acquired ownership and possession of the property. The cause of action in this case remained unchanged throughout, the only change being the transfer of liability.

In the petition for removal by the receivers it appears that one ground, upon which removal was asked was that a federal question was involved, presumably for the reason that an order of the federal court was drawn in question, and that a determination of the case would involve a construction of such an order. It nowhere appears in the record that the federal question, if existing at the time the removal was made, has ever disappeared, and if drawn in question, then it would still be open for determination after the joinder of the Texas Company as a party defendant, it appearing that the receivers still remain parties defendant to the cause throughout its entire course.

In the case of Hardenbergh vs. Ray, 151 U. S., 112, the following principle of law was laid down by the Court : That when the jurisdiction of the Circuit Court has fully attached against a tenant in possession in an action of ejectment the substitution of the landlord as defendant will in no way effect that jurisdiction, although he may be a citizen of the same State as the plaintiff.

In this case, the action of ejectment was first brought against the citizens of Oregon by a citizen of New York and subsequently a citizen of New York was substituted as defendant, and thereupon the point was made in the Court below that the parties to the suit being citizens of the same State, the jurisdiction of the United States Circuit Court was thereby defeated.

Mr. Justice JACKSON, reading the opinion of the Circuit court, says on this point:

"This objection to the jurisdiction of the Court is without merit and was properly overruled by the lower Court. When the original suit was brought against the persons in possession the court acquired jurisdiction of the controversy and no subsequent change of the parties could affect that jurisdiction. This is well settled by the authorities (Mullen vs. Torrents, 9 Wheat., 537; Dun vs. Clark, 6 Peters, 1; Clark vs. Matheson, 12 Peters, 164; White vs. Gibbs, 20 How., 541; Phelps vs. Oakes, 117 U. S., 236). In this last case it was held that in ejectment against tenants in possession of real estate whose landlord is a citizen of another State, the plaintiff had a real and substantial controversy with the defendant within the meaning of the act for the removal of the causes beyond the State Courts. It denies that the landlord is substituted and becomes a party for the purpose of protecting his own interests. The rule announced in this case clearly states in a case like the present that where the jurisdiction of the court has completely attached against the tenant in possession, the substitution of the landlord as a defendant for such tenant could in no way affect or defeat the jurisdiction of the Court."

In the case of Jarboe vs. Templer, 38 Fed. Rep., 213, the following principle of law was laid down by the court: That the jurisdiction of a federal court which has once attached by reason of diverse citizenship is not divested by a subsequent transfer of the cause of action by means of which transfer the controversy becomes one between citizens of the same state. In this case the claim sued upon became by purchase the property of one Kellogg, a citizen of the same state with the adverse party. The court says:

"The separable controversy between K. & Co. and the Railroad Company for which the cause had been removed, had become by K's purchase of the claim not another or different controversy, but a controversy in which a different party and a citizen of the same state

with the adverse party had become the party in interest. In Dun vs. Clark, 8 Peters, 2, a judgment in ejectment had been recovered by G., a citizen of Virginia, against C., a citizen of Ohio. G. died, and D., a citizen of Ohio, held the lien under the will of the deceased. C. filed his bill against D. in the United States Circuit Court of Ohio, praying for an injunction against enforcing said judgment and for a decree for the conveyance of the land to complainant. Here both parties were citizens of Ohio, but the court held that D., being the representative of G., the court had jurisdiction, that no change in the residence or condition of the parties can take away the jurisdiction once attached. If, however, new parties not privies to the suit were brought in over whom the court had no jurisdiction it could proceed no further with the case. In Clark vs. Matheson, 12 Peters, 107, W., a citizen of Connecticut, sued M., a citizen of Rhode Island, in the last named State. W. died pending the litigation and C., a resident of Rhode Island, was appointed his administrator. C sought to revive the suit in his name and the Circuit Court held it had no jurisdiction as both plaintiff and defendant were residents of the same state. The Supreme Court reversed the decision and held that C, as the representative of W, could maintain the suit; that it was not the original proceeding but a continuation of the original suit. The court says:

"'The parties to the original bill were citizens of different states and the jurisdiction of the court completely attached to the controversy. Having so attached it could not be divested by any subsequent events and the court had a rightful authority to proceed to a final determination of it. If after the commencement of the suit the original plaintiff had removed into and become a citizen of Rhode Island the jurisdiction over the cause would not have been divested by such change of domicile.'

"This seems to be directly in point on the question in controversy in this case. To the same effect see Morgan's Heirs vs. Morgan, 2 Wheaton, 290: 'The jurisdiction depends upon the state of things at the time the action was brought, and after it has once vested it cannot be divested by a subsequent change of residence of either of the parties.'

"Mollan vs. Torrants, 9 Wheaton, 537; Phelps vs. Oakes, 117 U. S., 236; Stewart vs. Dunham, 116 U.

S., 61; Gibson vs. Bruce, 108 U. S., 563. In the last-named cause the court decides that a state court cannot be deprived of its jurisdiction by change of citizenship after the suit was commenced. If a change of domicil making both parties citizens of the said state would not divest jurisdiction it is useless to argue that a transfer of the subject of litigation producing the same result would affect the jurisdiction. The suit between the J claim and the railroad claim still remained. And parties coming into the suit as privies or representatives of interest already involved in general take such interest as it then exists subject to these abilities and disabilities (Capple vs. Ellis, 110 U. S., 389; Railway Company vs. Shirley, 111 U. S., 358)."

2. IN THE PRESENT CASE THERE WAS NO DISTINCT CONTROVERSY AGAINST THE RAILWAY COMPANY. BUT THE COMPANY WAS IN PRIVITY WITH THE PARTIES ORIGINALLY SUED AND STOOD AS THEIR REPRESENTATIVE IN RESPECT TO THIS CLAIM AGAINST THEM. ALTHOUGH IT WAS A NEW PARTY IT WAS IN PRIVITY WITH THE ORIGINAL PARTIES DEFENDANT, AND THE CLAIM AGAINST IT WAS NOT ANOTHER OR A DIFFERENT CONTROVERSY BUT THE SAME ONE, TO WHICH THE JURISDICTION OF THE CIRCUIT COURT PROPERLY AND COMPLETELY ATTACHED AT ITS COMMENCEMENT, AND THEREFORE COULD NOT BE DIVESTED BY ANY SUBSEQUENT EVENTS.

In the case of Texas Transportation Co. vs. Seeligson, 122 U. S., 519, cited by the plaintiff in error, the facts were entirely different from those in the present case. In that case petition for removal was filed by a subsequent defendant on the ground of diverse citizenship between him and the plaintiff, and that the controversy with this defendant was separable, and the court sustained the removal on the express ground that there was a separate cause of action against the petitioner defendant, and that as soon as this separate cause of action was decided it was proper that the

cause should be remanded to the State court. In the present case there was no separate cause of action against the railway company, the cause of action remaining the same. The only change being in the condition of the party liable.

III.

If the first and second questions, or either of them, are answered in the negative has this court, under the writ of error jointly sued out by the receivers Cross and Eddy and the Missouri, Kansas and Texas Railway Company of Texas, jurisdiction and authority to reverse in to to the judgment of the Circuit Court, and direct a dismissal of the case as against the Missouri, Kansas and Texas Railway Company of Texas, and award a new trial as against Cross and Eddy, Receivers?

The statute provides that any party on the record who is injuriously affected by final judgment may appeal and sue out a writ of error, and it has been held that writs of error must be sued out jointly by all parties against whom judgment has been rendered. In the present case, however, judgment of dismissal was entered by the Court against the Receivers and, though even in such an event they might be entitled to appeal if such judgment of dismissal was in reality injurious, we are unable to see in what manner it is so in the present case. If any party to the record was

affected injuriously by the judgment of dismissal against the receivers it was the defendant in error and he has not appealed from that judgment. The receivers were absolutely discharged from all liability in respect of this case, and it does not appear that any judgment for costs was entered against them. Nor does the record show any controversy existing between the defendants whereby the Texas Company would be injured by the judgment of dismissal against the receivers so as to require the receivers to join with it in the writ of error on appeal. The writ of error was sued out jointly by all defendants, and, for the reasons above given, the appeal was, therefore, in our opinion, imperfect.

It may be well to inquire what the result would be if the appellate court had jurisdiction to reverse this case *in toto*. A final determination of the controversy could not be effected in this way, but, in case of such reversal, the judgment of dismissal against the receivers would be reversed and a new trial ordered as to them, and a judgment of dismissal entered against the Railway Company. This would enable the defendant in error to attempt to establish a liability on the part of the receivers, and this opportunity would be given him on the motion of the receivers themselves after the court had determined that no liability as to them existed.

We refrain from discussing more at length the proposition stated in the third certificate question for the reason that this question only becomes material in the event that the first two questions should be answered in the negative. We have already stated our reasons why such determination should not be made.

It appears from the record (p. 3) that the Texas

Company filed on September 14th, 1893, its original answer to the said second amended original petition of the plaintiff, in which answer it excepted to the maintenance of the suit against it, because it appeared from plaintiff's petition that both it and the plaintiff were citizens of the State of Texas, and that, therefore, the court did not have jurisdiction of the suit as to it. It also appears by the record (p. 3) that Eddy and Cross, receivers, adopted the answer of the Texas Company. The record also shows that the assignment of errors for review in the Circuit Court of Appeals was made jointly by the receivers and the Texas Company, and that in the second assignment it was contended by both the receivers and the Texas Company that the court erred in overruling the first special exception of the Texas Company adopted by the receivers to plaintiff's second amended petition, because both plaintiff and the Texas Company were citizens of the State of Texas, and the federal court could not take cognizance of the controversy between plaintiff and said defendant (Record, pp. 4 and 5). It consequently appears from the record that the case having been originally removed to the federal court upon the petition of the receivers, that subsequently the receivers excepted to the jurisdiction of the court to which, on their petition, the case was removed. The case of Cowley vs. Northern Pacific R. R. Co., 159 U. S., p. 583, the court say :

> " The case having been removed to the Circuit Court upon petition of defendant, it does not lie in its mouth to claim that such court has no jurisdiction of the case unless the court from which it was removed had no jurisdiction."

IV.

In case this court is without authority to reverse the judgment of the Circuit Court in favor of Cross and Eddy, the receivers, the same not having been complained of by the defendant in error, and in case the first two questions herein certified shall be answered in the negative, has this court authority to reverse the judgment of the Circuit Court and remand the case with instructions to remand the whole cause back to the state court from which it was originally removed?

The determination of this question is important only in case the first two certified questions be answered in the negative, and does not require discussion on our part.

The Texas Company was never made a party defendant in the state court, and, as far as this case is concerned, jurisdiction of that court never attached to it. If the appellate court had authority to reverse the judgment of the Circuit Court and remand the case, with instructions to remand the whole cause back to the state court from which it was originally removed, the effect would be to bring about a compulsory appearance upon the part of the Texas Company which would be ordinarily effected by the issue of some process, and we do not think that such appearance could be brought about by the judicial determination of the Circuit

Court. Its only authority is to remand, with instructions to dismiss on account of want of jurisdiction.

For the reasons which we have stated, questions 1 and 2 should be answered in the affirmative.

RUSH TAGGART,
Of Counsel for Defendant
in Error.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 211.

THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM H. ZIEGLER.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED JANUARY 11, 1895.

(15,767.)

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a *Transcript of Record.*

United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1892.

THE SPOKANE FALLS & NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
WILLIAM H. ZIEGLER, Defendant in Error. } No. 81.

Error to the circuit court of the United States for the district of Washington, eastern division.

b In the Circuit Court of the United States for the District of Washington, Eastern Division, April Term, 1892.

Be it remembered, that on the 19th day of February, 1892, there was duly filed in said circuit court of the United States, for the district of Washington, eastern division, a transcript of the record of the superior court of Spokane county, State of Washington, duly signed, sealed and certified by the clerk of said superior court, in words and figures as follows, to wit:

1 STATE OF WASHINGTON, *County of Spokane*, } *ss*:

In the Superior Court.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

Complaint.

Plaintiff complains and alleges:

1. That the defendant is, and at all times mentioned in this complaint was a corporation organized and existing under and by virtue of the Territory (now State) of Washington.

2. That on, to wit: the 1st day of May, 1889, the plaintiff was in possession as a pre-emptor under the laws of the United States of the following-described tract of land, lying, being, and situate in Spokane county, Washington, to wit: the east half of the southeast quarter of section four, township twenty-five north, of range forty-three east, Willamette meridian, containing about eighty acres, and on said date had made all the improvements and had lived on the said land a sufficient length of time, and done all other acts necessary to entitle him to a patent to the same from the United States upon making final proofs and paying the purchase price required by the laws of the United States, and on said date plaintiff had made final proofs and filed the same in the land office of the

United States at Spokane Falls, and had tendered the purchase price thereof, to wit: two dollars and a half per acre, to the receiver of said land office, and had demanded from the register and receiver of said land office a final receipt evidencing his entry of and payment for said land.

3. That the defendant corporation is and was authorized by its articles of incorporation to build, equip, and maintain and operate a line of steam railway from the city of Spokane in a northerly direction to the Columbia river, and — said day of May 2 1st, 1889, the said defendant entered upon and seized and possessed itself of, and has ever since maintained possession of a strip of land fifty feet wide, extending through said tract of land held, possessed and owned by the plaintiff as aforesaid, and has built thereon its railway track, and is now operating its line of railway over said strip of land; that the entry upon and seizure of said strip of land by defendant was under and pursuant to the laws of the then Territory of Washington authorizing railroad companies to appropriate lands for right of way for railroad tracks, and the said strip of land was appropriated by said defendant for the purpose aforesaid, and has ever since and is now being used for said purpose; that the general course of said railway and of the said strip of land on which it is laid over the tract of land hereinbefore described is shown by the plat or map hereto attached and made a part of this complaint.

(Here follows map marked p. 2*a*.)

4. That the entry by defendant upon said tract of land and the appropriation of the strip thereof aforesaid for railway purposes, was without the authority, but with the knowledge of plaintiff; that the said defendant has never paid plaintiff therefore, and has never taken legal proceedings of any kind to have his damages for taking and injuriously affecting his said land fixed and determined.

5. That the said tract of land is in close proximity to the city of Spokane, and at the time of the taking and injuriously affecting of said land by the defendant it was very valuable for residence purpose, and for the purpose of being platted into town lots and blocks; that the said right of way extends diagonally across the said tract of land and renders it impossible to plat the part of the said land abutting on the right of way advantageously. That the building and operating a line of steam railway through said tract of land largely diminishes its value for residence purposes or for any purpose. That the said railway is built through said tract of land at an elevation above the surface of the said tract in places, and below the surface at still other places, and thereby cuts and fills are made through the said tract, and all streets laid out across the said right of way will be required to conform to the grade of the railway, and lots abutting on said streets will be above and below the grade of the streets and will be liable to be filled with water in times of rain and freshets and melting snows, and in the particulars aforesaid,

and in others not enumerated, the said tract of land has been
3 injuriously affected and damaged by the taking and appropriation of said right of way, and the building of a railway thereon, in the sum of twenty-five thousand dollars. That the strip of land taken and appropriated by said defendant is of the value of five thousand dollars.

6. That since the taking and appropriation of said strip of land and the building by defendant of its railway thereon, and before the bringing of this action, the final proofs made by plaintiff and filed at the land office as aforesaid, have been passed on and accepted as satisfactory by the proper officers of the United States; the money then tendered has been accepted and a patent from the United States to plaintiff for said tract of land has been duly executed and delivered to him, and plaintiff is now the owner in fee of the said tract of land.

Wherefore plaintiff demands judgment against said defendant for thirty thousand dollars as compensation for the taking of said strip of land for the injuriously affecting of the remainder of the tract, and for cost of suit in this action to be expended.

TURNER, GRAVES & McKINSTRY,
Attorneys for Plaintiff.

STATE OF WASHINGTON, } ss:
County of Spokane, }

William H. Ziegler, being first duly sworn, on his oath deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true as he verily believes.

WILLIAM H. ZIEGLER.

Subscribed and sworn to before me this 3d day of October, 1891.

CHARLES H. WOLF,
Notary Public in and for the State of Washington, Residing at Spokane.

Filed October 5, 1891.

J. M. ARMSTRONG, *Clerk,*
By H. WARNER, *Deputy.*

And afterwards, to wit: on the 8th day of October, 1891, there was duly issued out of said court a summons in words and figures as follows, to wit:

4 STATE OF WASHINGTON, } ss:
County of Spokane, }

In the Superior Court for Spokane County, Washington, Held at Spokane.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS & NORTHERN RAILWAY COMPANY, Defendant.

The State of Washington to above-named defendant, Greeting:

You are hereby required to appear in the superior court of Spokane county, State of Washington, held at Spokane, within twenty days after the day of service of this summons upon you, exclusive of the day of services, if served in the above county; if not served in said county, but in any other county in said State, in thirty days after the day of service, and answer the complaint of the above-named plaintiff now on file in the office of the clerk of said court, a copy of which complaint is herewith delivered to you; and unless you so appear and answer, the plaintiff will apply to the court for the relief demanded in said complaint.

Witness my hand and the seal of said court, this 5th day of October, 1891.

[Seal Superior Court, Spokane County.]

J. M. ARMSTRONG,
Clerk of said Court,
By H. WARNER, *Deputy.*

TURNER & GRAVES,
Attorneys for Plaintiff.

(Endorsement of back.)

STATE OF WASHINGTON, } ss:
County of Spokane, }

I, F. H. Pugh, sheriff of Spokane county, State of Washington, do hereby certify that I served the within summons, together with the complaint, in the within-entitled action, on the within-named defendant, The Spokane Falls & Northern Railway Company,
5 by leaving with D. C. Corbin, the president of said company, in Spokane county, State of Washington, on the 7th day of October, A. D. 1891, by then and there delivering to said defendant personally a copy of said summons, together with a copy of said complaint, each and both certified to be such copies by Turner, Graves & McKinstry.

F. K. PUGH,
Sheriff of Spokane County, Washington,
By C. A. COLE, *Deputy.*

Sheriff's Fees.

Serving summons	$1 00
Mileage: — miles	20
Total	$1 20

STATE OF WASHINGTON, } ss:
County of Spokane, }

I hereby certify that the within is a correct copy of the original summons in the above-entitled cause.
Dated this — day of ——, 189–.

——— ———,
Attorneys for Plaintiff.

(Original) case number 2104. Summons. (Personal service.) Superior court of Spokane county, Washington, held at Spokane, Spokane county, in said State. William H. Ziegler, plaintiff, *vs.* S. F. & N. R'y Co., defendant. Returned and filed this 8th day of October, 1891. J. M. Armstrong, clerk, by N. B. Buckler, deputy.

And afterwards, to wit: on the — day of ——, 1892, there was duly filed in said court, in said cause, a notice in the words and figures as follows, to wit:

STATE OF WASHINGTON, } ss:
County of Spokane, }

In the Superior Court, Holding Terms at Spokane, Washington.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

Notice.

To William H. Ziegler, plaintiff, and to Messrs. Turner, Graves & McKinstry, attorneys for said plaintiff:

6 Please take notice that the defendant in the above-entitled action, The Spokane Falls & Northern Railway Company, by its counsel, Messrs. Hyde, McBride & Allen, will this day file in the superior court of the State of Washington, holding terms at Spokane, Washington, and in the same department in which the above-entitled action is pending, its petition and bond for removal of said cause from the said superior court to the circuit court of the United States for the district of Washington, eastern division, holding terms at Spokane, Washington; and that said petition will be brought on for hearing before the said the honorable superior court upon this day or as soon thereafter as counsel can be heard.

The annexed petition and bond are full, true and correct copies of the petition and bond to be filed by the defendant in said action, as specified in this notice.

Dated October 26th, 1891.

HYDE, McBRIDE & ALLEN,
Attorneys for Defendant.

And afterwards, to wit: on the 26th day of October, 1891, there was duly filed in said court in said cause a petition for the removal of this cause to the U. S. circuit court in the words and figure- as follows, to wit:

STATE OF WASHINGTON, } ss:
County of Spokane, · }

In the Superior Court.

WILLIAM H. ZEIGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILROAD COMPANY, Defendant.

Petition for the Removal of this Cause to the United States Circuit Court for the District of Washington, Eastern Division.

To the honorable the superior court of the State of Washington in and for Spokane county:

Your petitioner, The Spokane Falls & Northern Railway Company, respectfully shows that it is the defendant in the above-entitled suit.

7 That it is now and ever since the 17th day of April, 1888, has been a corporation duly organized and existing under the laws of the Territory (now State) of Washington, for the purpose of constructing, operating and maintaining a railroad, running from the city of Spokane Falls in a northerly direction through the counties of Spokane and Stevens, State of Washington, to the Columbia river.

Your petitioner further represents that on the 5th day of June, 1888, it filed in the office of the honorable Secretary of the Interior at Washington, D. C., a copy of the articles of incorporation, together with due proofs of its organization under the same, which said copy of articles of incorporation and proofs of organization were in due form of law, and were duly approved by the honorable Secretary of the Interior on the 5th day of June, 1888, and that by reason thereof your petitioner became on said 5th day of June, 1888, and ever since has been entitled to survey, locate, construct and maintain its railroad through, over and across all lands between the termini of said railroad, and which were public lands of the United States at the time of filing said copy of articles of incorporation and proofs of organization with the honorable Secretary of the Interior as aforesaid, and became the owner of a right of way through all public lands to the extent of one hundred feet on each side of the center line of its road upon such route as it might select, and also the right to take from the public lands adjacent to the line of said road material, earth and stone and timber necessary for the construction of said railroad, as provided, and as granted by the act of Congress entitled "An act granting to railroads the right of way through the public lands of the United States," approved March 3d, 1875; and that by the filing of said copy of articles of incorporation

and proofs of organization, and the approval thereof by the honorable Secretary of the Interior, as aforesaid, the grant in said act of Congress became operative and applied to your petitioner to the same extent as if the same had been a special grant in the name of your petitioner.

Your petitioner further shows that afterwards, and in the month of March, 1889, your petitioner under and in pursuance of said act of Congress, and in accordance with the provisions thereof, and as authorized by its charter and the laws of the Territory of Washington, commenced the construction of its said railroad be-
8 tween the city of Spokane Falls and the Columbia river aforesaid; and that between the 8th day of March, 1889, and the 8th day of April, 1889, your petitioner surveyed the definite line or route of its railroad from a point in said city to a point twenty — northerly thereof, to be surveyed and marked on the ground, so that the line thereof could be readily traced, and in the manner usual and customary in surveying and marking lines for the construction of railroads; and that said line of route of said road as surveyed and marked upon the ground run through, over and across the lands described in plaintiff's complaint herein, and upon the same line where the railroad of your petitioner is constructed as alleged in said complaint; and that thereafter, and in the months of March, April, May and June, 1889, your petitioner fully completed and constructed its railroad upon said line of survey, over and across the said lands described in the complaint; and that afterwards in the year 1889, it fully completed its said railroad from said city of Spokane Falls to said Columbia river, and has ever since operated the same.

Your petitioner further shows that, at the time of filing of a copy of its articles of incorporation and due proofs of its organization with the Hon. Secretary of the Interior and the approval thereof by him as aforesaid, and during all the time thereafter until after the final completion of said railroad, the said lands described in the complaint were public lands of the United States, and the title thereto was in the Government of the United States, and the same were subject to the grant in said act of Congress, approved March 3d, 1875, as made applicable to your petitioner by the filing of a copy of its articles of incorporation and proofs of organization with the honorable Secretary of the Interior as aforesaid.

Your petitioner further shows that, within twelve months after the location of said railroad over said land as aforesaid, to wit: on the 3d day of August, 1889, it filed with the register of the land office for the district where the said lands were located, a profile of its said railroad, which said profile was duly approved by the Hon. Secretary of the Interior on the — day of December, 1889, and long prior to the entry by the plaintiff of the lands described in the complaint.

Your petitioner further avers that in the construction of its said railroad across the lands described in the complaint no im-
9 provements of the plaintiff thereon were taken, destroyed or damaged in any manner.

Your petitioner further avers that, by reason of the foregoing facts, it is now, and at all times since the 5th day of June, 1888, has been the owner of a right of way one hundred feet in width on each side of the central line of its road as constructed, through, over and across the lands described in the complaint; and that it had and has good and lawful right to construct and maintain its railroad thereon at the place and in the manner in which it has done.

And your petitioner further avers that all right and title which the plaintiff has in the premises described in the complaint were acquired by an entry of said lands and a patent made and issued long subsequent to the construction of said railroad, and long after the approval of the profile of said road by the Hon. Secretary of the Interior as aforesaid, and that such disposition of said lands to the plaintiff by the Government of the United States was, by virtue of said act of Congress (approved March 3d, 1875), subject to the right of way of your petitioner aforesaid.

Your petitioner further avers that by reason of a compliance by it with said act of Congress as aforesaid, it has become and is the owner of a right of way to the extent of one hundred feet in width on each side of the central line of its railroad, through the lands described in the complaint, and that such right is superior to the rights of the plaintiff herein; while the plaintiff — that under the pre-emption laws of the United States and by reason of his settlement thereon, and a mere filing of a declaratory statement therefore, the said act of March 3d, 1875, did not apply, and that your petitioner obtained no rights in said premises.

And your petitioner therefore says that this suit arises under the laws of the United States; and that the rights of the plaintiff and your petitioner depend upon the pre-emption laws of the United States, and upon said act of March 3d, 1875, and upon the right construction of said laws as applied to the facts herein.

And your petitioner offers herewith a bond, with good and sufficient surety for its entering in said circuit court of the United States, on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

10 And your petitioner prays this honorable court to proceed no further therein, except to make an order for the removal of this cause to said circuit court, and to accept the said surety and bond and to cause the record herein to be removed to the said circuit — of the United States, in and for the district of Washington, eastern division. And your petitioner will ever pray.

HYDE, McBRIDE & ALLEN,
Attorneys for Petitioner.

STATE OF WASHINGTON, } ss:
County of Spokane, }

I, Albert Allen, being duly sworn, do say that I am a member of the firm of Hyde, McBride & Allen, the attorneys for the petitioner in the above-entitled cause. That I have read the foregoing petition

and know the contents thereof, and that the statements and allegations therein are true, as I verily believe.

ALBERT ALLEN.

Subscribed by said Albert Allen in my presence, and by him sworn to before me this 24th day of October, A. D. 1891.

JAMES B. JONES,
Notary Public, Residing at Spokane, Washington.

Filed Oct. 26, 1891.

J. M. ARMSTRONG, *Clerk*,
By N. B. BUCKLER, *Deputy.*

And afterwards, to wit, on the 26th day of October, 1891, there was duly filed in said court in said cause, a bond in the words and figures as follows, to wit:

Know all men by these presents:

That the Spokane Falls and Northern Railway Company and Geo. H. Martin and B. C. Van Houten as sureties, are held and firmly bound unto William H. Ziegler, in the penal sum of five hundred dollars ($500.00) for the payment whereof, well and truly to be made unto the said William H. Ziegler, his heirs and assigns, we bind ourselves, our heirs, representatives and assigns jointly and severally by these presents:

Yet upon these conditions: That the Spokane Falls and Northern Railway Company, having petitioned the superior court of the State of Washington in and for the county of Spokane, for the removal of a certain cause therein pending, wherein William
11 H. Ziegler is plaintiff and The Spokane Falls and Northern Railway Company is defendant, to the circuit court of the United States, in and for the district of Washington, eastern division:

Now if the said Spokane Falls and Northern Railway Company, petitioner, shall enter in said circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 24th day of October, A. D. 1891.

THE SPOKANE FALLS AND NORTHERN R'Y CO.,
By D. C. CORBIN, *President.* [SEAL.]
GEO. H. MARTIN. [SEAL.]
B. C. VAN HOUTEN. [SEAL.]

Attest: ALBERT ALLEN,
Assistant Secretary.

[Seal of S. F. and N. R'y Co.]

STATE OF WASHINGTON, } ss:
County of Spokane, }

George H. Martin and B. C. Van Houten of said county, the sureties named in the foregoing bond, being severally duly sworn, does each for himself depose and say: That he is a resident of the State of Washington and a property-holder therein; that he is worth the sum of five hundred dollars ($500.00) over and above all his debts and liabilities and exclusive of property by law exempt from execution; that he has property in the State of Washington liable to execution of the value of more than five hundred dollars ($500.00).

GEO. H. MARTIN.
B. C. VAN HOUTEN.

Subscribed and sworn to before me this 27th day of October, A. D. 1891.

GEO. F. WEIDMAN,
Notary Public, Residing at Spokane, Washington. [SEAL.]

Filed October 26th, 1891.

J. M. ARMSTRONG, *Clerk,*
By N. B. BUCKLER, *Deputy.*

12 STATE OF WASHINGTON, } ss:
County of Spokane, }

In the Superior Court.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

Now on this day this cause coming on to be heard upon the motion to remove this cause to the United States court, and this court having heard the arguments of counsel, takes the matter under advisement.

Superior Court Journal, page 498, January 26th, 1892.

STATE OF WASHINGTON, } ss:
County of Spokane, }

In the Superior Court.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

Motion on the part of the defendant to transfer this cause to the United States court. Hearing postponed until 2 p. m. tomorrow, the 26th inst.

MOORE, *Judge.*

Superior Court Journal, page 494, Jan. 25th, 1892.

13 STATE OF WASHINGTON, } ss:
County of Spokane, }

In the Superior Court.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

The defendant in the above-entitled cause, having, on the 26th day of October, 1891, and within the time provided by law for answering said cause, duly filed its petition and bond for the removal of said cause to the United States circuit court for the district of Washington, eastern division, and it appearing from said petition that the determination of said cause will involve a disputed construction of statutes of the United States, and that it is a proper cause to be so removed:

It is ordered that the said bond be, and the same is hereby approved, and that this court proceed no further in said cause, and that the clerk of this court immediately make out and deliver to defendant's attorneys a transcript of all pleadings, records and files in said cause, duly certified, as provided by law.

Done in open court this 11th day of February, A. D. 1892.

By the court:

JAMES Z. MOORE, *Judge.*

Superior Court Journal "M," page 560.

14 STATE OF WASHINGTON, } ss:
County of Spokane, }

In the Superior Court.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

Transcript of Fee Book.

Plaintiff's costs paid	$1 95
Defendant's cost paid	12 40

STATE OF WASHINGTON, } ss:
County of Spokane, }

I, J. M. Armstrong, clerk of the superior court for Spokane county, State of Washington, hereby — the above and foregoing to be a full, complete and correct transcript of all the pleadings, papers and journal entries in the above and foregoing cause, as the same appears of record in my office.

In witness whereof I have hereunto set my hand and the seal of said superior court this 11th day of February, A. D. 1892.

[Seal of the Superior Court of Spokane, County Wash.]

J. M. ARMSTRONG, *Clerk*,
By N. B. BUCKLER, *Deputy*.

Endorsement on back of foregoing transcript: Filed February 19th, 1892, in the United States circuit court. A. Reeves Ayers, clerk, by S. A. Wells, deputy.

And, afterwards, to wit, on the 19th day of February, 1892, there was duly filed in said court in said cause an answer in the words and figures as follows, to wit:

15 In the Circuit Court of the United States for the District of Washington, Eastern Division.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILROAD COMPANY, Defendant.

Answer.

Now comes the defendant in the above-entitled action, and for answer to the complaint of plaintiff herein:

1. Denies that at the time of the alleged taking and injuriously affecting of the land described in the complaint by the defendant, it was very valuable, or valuable at all for residence purposes or for the purpose of being platted into town lots or blocks, or for any other purpose, and denies that said plaintiff at that time had any right or ownership in said land by which he was authorized to plat the same into lots and blocks or to sell such lots and blocks, if the same had been platted.

2. Admits that said right of way extends diagonally across said tract, but denies that it renders it impossible to plat the part of said — abutting on said right of way advantageously.

3. Denies that the building and operation of the line of steam railway through said tract of land largely diminishes, or at all diminishes its value for residence purposes, or for any purpose.

4. Admits that said railway is built through said tract of land at an elevation above the surface of said tract in places, and below the surface in other places, and that thereby cuts and fills are made through said tract; but alleges that said cuts and fills are very small, and denies that by reason of any streets laid out across said right of way being made to conform to the grade of said railroad, the lots abutting on such streets will be liable to be filled with water at times of rains, washouts and melting snow.

5. Denies that by reason of the taking and appropriation of said right of way, or the building of a railroad thereon, or by reason of

any of the particulars enumerated in the complaint the said tract of land has been injuriously affected or damaged in the sum
16 of twenty-five thousand dollars ($25,000.00), or in any other sum whatsoever, and denies that the said strip of land taken and appropriated by the defendant is of the value of five thousand dollars ($5,000.00), or any other sum whatsoever.

And for further answer to said complaint defendant alleges:

1. That it is now, and ever since the 17th day of April, 1888, has been a corporation duly organized and existing under the laws of the Territory (now State) of Washington, for the purpose of constructing, operating and maintaining a railroad, running from the city of Spokane Falls (now city of Spokane), in a northerly direction through the counties of Spokane and Stevens, in the State of Washington, to the Columbia river.

2. That on the 5th day of June, 1888, the defendant filed in the office of the Hon. Secretary of the Interior, at Washington, D. C., a copy of its articles of incorporation, together with due proofs of its organization under the same, which said copy of articles of incorporation and proofs of organization were in due form of law and were duly approved by the Hon. Secretary of the Interior on the 5th day of June, 1888, and that by reason thereof this defendant became, on the said 5th day of June, 1888, and ever since has been entitled to survey, locate, construct and maintain its railroad through over and across all lands between the termini of said railroad which were public lands of the United States at the time of filing said articles of incorporation and proofs of organization with the honorable Secretary of the Interior as aforesaid, and became the owner of a right of way through the public lands to the extent of one hundred feet on each side of the central line of its road upon such route as it might select; and also the right to take from the public lands adjacent to the line of said road material, earth, stone and lumber necessary for the construction of said railroad, as provided and as granted by the act of Congress entitled "An act granting to railroads the right of way through the public lands of the United States," approved March 3d, 1875, and that by the filing of said copy of the articles of incorporation and proofs of organization and the approval thereof by the Hon. Secretary of the Interior as aforesaid, the grant in said act of Congress became operative and applied to the defendant to the same extent as if the same had been a special grant in the name of this defendant.

3. Defendant further alleges that afterwards, and in the month of March, 1889, defendant, under and in pursuance of said
17 act of Congress, and in accordance with the provisions thereof and as authorized by its said articles of incorporation and the laws of the Territory of Washington, commenced the construction of its said railroad between the said city of Spokane and the Columbia river aforesaid, and between the 8th day of March, 1889, and the 8th day of April, 1889, defendant further surveyed the definite line of route of its road from a point in said city to a point twenty — northerly thereof, and caused such survey to be marked on the ground so that the line thereof could be readily

traced, and in the manner usual and customary in surveying and marking lines for the construction of railroads, and that said line of route of said road as so surveyed and marked upon the ground ran through, over and across the lands described in plaintiff's complaint herein in and upon the same line where the railroad of this defendant is constructed as alleged in said complaint, and that thereafter and in the months of March, April, May and June, 1889, this defendant fully constructed and completed its said railroad upon said line of survey over and across said lands described in the complaint; and that afterwards, in the year 1889, it fully completed its said railroad from the said city of Spokane Falls to the said Columbia river, and has ever since operated the same.

4. Defendant further alleges that at the time of filing a copy of its articles of incorporation and due proofs of its organization with the honorable Secretary of the Interior, the approval thereof by him as aforesaid, and during all the time thereafter until after the final completion of said railroad, the said lands described in the complaint were public lands of the United States, and the title thereto was in the Government of the United States, and the same was subject to the grant in said act of Congress, approved March 3rd, 1875, as made applicable to this defendant by a filing of a copy of its articles of incorporation and proofs of its organization, with the honorable Secretary of the Interior, as aforesaid.

5. Defendant further alleges that within twelve months after the location of said railroad over said land, as aforesaid, to wit: on the 3rd day of August, 1889, it filed with the register of the land office for the district where said lands were located, a profile of its said railroad, which said profile was duly approved by the honorable Secretary of the Interior, on the — day of December, 1889, and long prior to the entry by plaintiff of the lands described in the complaint.

18

6. Defendant further alleges that in the construction of its said railroad across the lands described in the complaint no improvements of the plaintiff thereon were taken, destroyed or damaged in any manner.

7. Defendant further alleges that by reason of the foregoing facts, it is now, and at all times since the 5th day of June, 1888, has been the owner of a right of way, consisting of one hundred feet in width on each side of the central line of its road as constructed through, over and across the lands described in the complaint, and that it had and has good and lawful right to construct and maintain its said railroad thereon, at the place and in the manner in which it has done.

8. Defendant further alleges that all right and title which the plaintiff has in the premises described in the complaint, were acquired by an entry of said lands and a patent issued long subsequent to the construction of said railroad, and long after the approval of the profile of said route by the honorable Secretary, as aforesaid, and that the sale and conveyance of said lands by the Government to the plaintiff, as alleged in the complaint, was, by

virtue of the said act of Congress, approved March 3rd, 1875, subsequent to the right of way of this defendant.

9. Defendant further alleges that by reason of the compliance by it with said act of Congress, as aforesaid, it has become and is the owner of a right of way to the extent of one hundred feet on each side of the central line of its railroad, as the same is constructed through the lands described in the complaint, and that such right is and at all times has been prior to the rights of the plaintiff therein, and that the construction and maintenance by the defendant of its railroad across the land described in the complaint, under and in pursuance of said act of Congress, as aforesaid, as it had a right to do, constitute the supposed grievances complained of by the plaintiff.

Wherefore defendant demands judgment that the plaintiff take nothing by this action, and that its title and right to a strip of land one hundred feet in width on each side of the central line of its said railroad, as constructed through, over and across the lands described in the complaint, be forever quieted in this defendant, and that it have judgment against the plaintiff for its costs herein.

McBRIDE & ALLEN,
Attorneys for Defendant.

19 STATE OF WASHINGTON, } ss:
County of Spokane, }

Albert Allen, being duly sworn, deposes and says that he is the assistant secretary of The Spokane Falls and Northern Railway Company, the defendant in the above-entitled action, which office is created by the articles of incorporation and by-laws of said company. That he has read the foregoing answer and knows the contents thereof, and that he verily believes the same to be true.

ALBERT ALLEN.

Subscribed and sworn to before me this 19th day of February, 1892.

[NOTARIAL SEAL.] S. C. HYDE,
Notary Public, Residing at Spokane, Washington.

Due service of a copy of the within answer admitted this 19th day of February, 1892.

TURNER, GRAVES & McKINSTRY,
Attorneys for Plaintiff.

No. 83. In the circuit court of the United States for the district of Washington, eastern division. William H. Ziegler, plaintiff, *vs.* The Spokane Falls and Northern Railway Company, defendant. Answer (original). Filed February 19th, 1892. In the United States circuit court. A. Reeves Ayers, clerk, by S. A. Wells, deputy. McBride & Allen, attorneys for defendant.

And afterwards, to wit: on the 11th day of March, 1892, there was duly filed in said court in said cause a reply in the words and figures as follows, to wit:

In the Circuit Court *Court* of the United States of America for the District of Washington, Eastern Division.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILROAD COMPANY, Defendant.

20 Comes the plaintiff above named and for reply to the affirmative matter contained in the answer in the above-entitled action:

1. Denies that he has knowledge or information sufficient to form a belief as to whether the defendant filed in the office of the honorable Secretary of the Interior, at Washington, D. C., a copy of its articles of incorporation, together with due proofs of its organization under the same; or whether said — of said articles of incorporation and proofs were in due form, or whether the same were duly approved by the honorable Secretary of the Interior on the 5th day of June, 1888, or at any other time, and denies that by reason of the filing of the copy of said articles, together with proofs of its organization, defendant became, on the 5th day of June, 1888, or at any other time, and ever since has been entitled to survey, locate, construct and maintain its railroad through, over and across all the lands between the termini of said railroad which were public lands of the United States at the time of filing said copy of articles of incorporation and proofs of organization with the honorable Secretary of the Interior, and denies that it became the owner of a right of way through the public lands to the extent of one hundred feet on each side of the central line of its road upon such route as it might select, and also the right to take from the public lands adjacent to the line of said road material, earth, stone and lumber necessary for the construction of said railroad as provided and as granted by the act of Congress entitled "An act granting to railroads the right of way through the public lands of the United States," approved March 3d, 1875. And denies that by the filing of said copy of the articles of incorporation and proofs of organization and the approval thereof by the honorable Secretary of the Interior, the grant in said act of Congress became operative, and applied to defendant to the same extent as if the same had been a special grant in the name of this defendant.

2. Plaintiff denies that the doing of the several acts and things alleged in the third paragraph of said answer, was under and in pursuance of and in accordance with the provisions of the act of Congress above referred to; and denies that he has knowledge or information sufficient to form a belief whether the said acts and things were done at the times and in the manner in said paragraph alleged.

3. That said plaintiff denies that at the time of filing a
21 copy of said articles of incorporation and proofs of its organization with the honorable Secretary of the Interior and the approval thereof by him, the lands described by plaintiff in his complaint were public lands of the United States, or that the same

were public lands of the United States during all the time thereafter until the final completion of said railway, or that the title thereto was in the Government of the United States; and denies that the same was subject to the grant of said act of Congress, approved March 3d, 1875.

4. Plaintiff denies any knowledge or information sufficient to form a belief whether defendant, within twelve months after its location of its railroad over said land, to wit: on the 3rd day of August, 1889, or at any other time, it filed with the register of the land office for the district where said lands were located a profile of its said railroad, which said profile was duly approved by the honorable Secretary of the Interior on the — day of ——, 1889, plaintiff denies that if the same was done that it was long prior to the entry by plaintiff of the lands described in his complaint.

5. Plaintiff denies that by reason of the facts in said answer alleged, or at all, the defendant is now or has been at all times since the 5th day of June, 1888, or ever has been the owner of the right of way of one hundred feet in width on each side of the central line of its road as constructed through, over and across the lands described in the complaint; and denies that it had or has good and lawful right to construct and maintain its said railroad thereon at the place and in the manner in which it has done.

6. Plaintiff denies that all the right and title which he has in the premises described in the complaint were acquired by an entry of said land and a patent issued long subsequent to the construction of said railroad, and long after the approval of the profile of said route by the honorable Secretary, as aforesaid, and denies that the sale and conveyance of said lands by the Government, as alleged in the complaint, was by virtue of the said act of Congress approved March 3rd, 1875, or at all, subject to the right of way of defendant.

7. Plaintiff denies that by reason of the compliance of the defendant of the said act of Congress, or at all, the defendant has become or is the owner of a right of way to the extent of one hundred feet on each side of the central line of its railroad, as the same is constructed through the lands described in the complaint, or of
22 a right of way of any width whatever. And plaintiff denies that such right is or ever has been prior to the rights of plaintiff in the said lands. And denies that the construction and maintenance by defendant of its railroad across the lands described in the complaint pursuant to said act of Congress, as aforesaid, constitute the supposed grievances complained of by the plaintiff. And denies that the said railroad was constructed and is maintained across the said lands under and pursuant to the said act of Congress.

Wherefore plaintiff demands judgment as in his complaint he has prayed.

TURNER, GRAVES & McKINSTRY,
Attorneys for Plaintiff.

STATE OF WASHINGTON, } ss:
County of Spokane, }

William H. Ziegler being fully duly sworn on his oath deposes and says that he is the plaintiff in the above-entitled action; that he has read the foregoing reply, knows the contents thereof and believes the same to be true.

W. H. ZIEGLER.

Subscribed and sworn to before me this 11th day of March, 1892.

[NOTARIAL SEAL.] CHARLES H. WOLF,
Notary Public in and for the State of Washington,
Residing at Spokane.

Endorsements: Personal service of within reply accepted March 11th, 1892. McBride & Allen, attorneys for defendant. No. 83. Wm. H. Ziegler *vs.* S. F. & N. R'y Co. Reply. Filed March 11th, 1892. A. Reeves Ayers, clerk.

And afterwards, to wit, on the 25th day of April, 1892, the same being the 23d judicial day of the regular April term of said court, present, the Honorable Cornelius H. Hanford, United States district judge, presiding, the following proceedings were had in said cause, to wit:

Regular April Term, Record of April 25th, 1892.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

23 *Trial.*

On this day the cause coming on for trial the plaintiff appears by his attorneys, Messrs. Turner, Graves and McKinstry, and the defendant by Messrs. McBride and Allen, its attorneys, and thereupon a jury being called, came and duly answered to their names and were sworn, to wit: E. C. Gurnee, George Dunne, A. T. Greene, T. P. Lindsay, W. L. Majors, A. J. Sliger, A. S. Markham, S. M. Mishey, C. W. Ide, J. S. Murray, James Neilson, John Nash.

And said cause thereupon duly proceeded by hearing the evidence until the hour of adjournment, when by consent of counsel the jury being admonished by the court were allowed to separate until the incoming of the court tomorrow morning. (U. S. Circuit Court Clerk's Minute Book, page 163.)

And afterwards, to wit, on the 26th day of April, 1892, the same being the 24th judicial day of the regular April term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

This cause again coming on, the jury being called, duly answered to their names and said cause thereupon duly proceeded until the hour of adjournment, when by consent the jury were admonished and allowed to separate till the incoming of court tomorrow morning.

Record of April 26th, 1892.

U. S. Circuit Court Clerk's Minute Book, page 164.

And afterwards, to wit, on the 25th day of April, 1892, the same being the twenty-third judicial day of the regular April term of said court—present, the Hon. Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

24 *Regular April Term, Record of April 25th,* 1892.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

Trial.

On this day, this cause coming on for trial, the plaintiff appears by his attorneys, Messrs. Turner, Graves & McKinstry, and the defendant by Messrs. McBride & Allen, its attorneys, and thereupon a jury being called, came and duly answered to their names and were sworn, to wit:—

E. C. Gurnee, George Dunne, A. T. Greene, T. P. Lindsay, W. L. Majors, A. J. Sliger, A. S. Markham, S. M. Mishey, C. W. Ide, J. S. Murray, James Neilson, John Nash.

And said cause thereupon duly proceeded by hearing the evidence until the hour of adjournment, when by consent of counsel, the jury being admonished by the court, were allowed to separate till the incoming of the court tomorrow morning.

U. S. Circuit Court Clerk's Minute Book, page 163.

And afterwards, to wit, on the 26th day of April, 1892, the same being the twenty-fourth judicial day of the regular April term of said court—present, the Hon. Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

This cause again coming on, the jury being called, duly answered to their names, and said cause thereupon duly proceeded
25 until the hour of adjournment, when by consent the jury were admonished and allowed to separate till the incoming of court tomorrow morning.

Record of April 26th, 1892.

U. S. Circuit Court Clerk's Minute Book, page 164.

And afterwards, to wit, on the 27th day of April, 1892, the same being the twenty-fifth judicial day of the regular April term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

And now on this day, this cause again coming on for hearing, the jury being called answered to their names, and the cause thereupon duly proceeded by hearing the evidence and arguments of counsel till the close of the case, when the jury, being duly charged by the court, retired to deliberate on their verdict; and now, after due deliberation, the said jury come into open court and return the following verdict and special finding in said case, to wit:

United States Circuit Court, District of Washington, Eastern Division.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILROAD COMPANY, Defendant.

Verdict.

We, the jury, in the case of William H. Ziegler, plaintiff
26 against The Spokane Falls and Northern Railroad Company, defendant, find for the plaintiff, and assess his damages at the sum of seven thousand five hundred dollars, ($7,500.00).

C. W. IDE, *Foreman.*

Returned and filed April 27th, 1892.

A. REEVES AYRES, *Clerk.*

Special Finding.

We, the jury, in the case of William H. Ziegler, plaintiff, against The Spokane Falls and Northern Railroad Company, defendant,

find specially, that the defendant has appropriated for its right of way a strip of land twenty-five feet in width on each side of the center line of its track, extending across the plaintiff's land described in the complaint, and no more; and that the area of plaintiff's land so appropriated is one and eight-tenths acres and no more; and the amount of damages awarded by our general verdict is computed upon the basis of the land appropriated for said right of way, being a strip fifty feet in width and containing one and eight-tenths acres.

C. W. IDE, *Foreman.*

Returned and filed April 27th, 1892.

A. REEVES AYRES, *Clerk.*

U. S. Circuit Court Clerk's Minute Book, page 166.

And afterwards, to wit, on the 29th day of April, 1892, the same being the 27th judicial day of the regular term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILROAD COMPANY, Defendant.

Judgment.

On this 29th day of April, A. D. 1892, upon the motion of said plaintiff's for judgment herein, upon the verdict of the jury heretofore returned, filed and entered herein:

27 It is by the court considered and adjudged that the plaintiff, William H. Ziegler, do have and recover from the defendant, The Spokane Falls and Northern Railroad Company, the sum of seven thousand five hundred dollars, together with their costs and disbursements therein, taxed at — dollars.

C. H. HANFORD, *Judge.*

U. S. Circuit Court Judgment Register, page 23.

And afterwards, to wit: on the 29th day of April, 1892, there was filed in said court in said cause motion for a new trial, in words and figures as follows, to wit:

In the Circuit Court of the United States in and for the District of Washington, Eastern Division.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

Now comes the defendant in the above-entitled action and moves the court to set aside the verdict and to grant a new trial in the cause upon the following grounds, to wit:

1. Excessive damages appearing to have been given under the influence of passion and prejudice.

2. Error in the assessment of damages, the amount fixed by the jury being greatly in excess of any amount established by the evidence competent to be considered by the jury.

3. Insufficiency of the evidence to justify the verdict and that the verdict is against law.

4. Errors in law occurring at the trial and excepted to at the time by the defendant.

This motion is made upon the minutes of the court and upon the pleadings and proceedings in the clerk's office.

McBRIDE & ALLEN,
Attorneys for Defendant.

(Endorsement on back:) United States circuit court, district of Washington, eastern division. Wm. H. Ziegler, plaintiff, *vs.* The Spokane Falls and Northern Railway Company, defendant; motion for a new trial; filed April 29, 1892. A. Reeves Ayers, clerk. McBride & Allen, attorneys for defendant. Due service of a copy of the within motion admitted this 29th day of April, 1892. Turner, Graves & McKinstry, plaintiff's attorneys.

28

And afterwards, to wit: on the 30th day of April, 1892, there was duly filed in said court in said cause an order fixing time for hearing motion for a new trial in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Washington.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

Now, on this 30th day of April A. D. 1892, on motion of the defendant in the above cause, it is ordered that the hearing of the motion for new trial heretofore filed herein be postponed until the adjourned session of this court on the 26th day of May, A. D. 1892, at the opening of court on that day or as soon thereafter as counsel can be heard, and until such hearing and the decision of the court thereon, it is ordered that all proceedings upon the judgment herein be stayed. And it is further ordered, the plaintiff consenting thereto, that the defendant have until the said 26th day of May, 1892, and until the hearing and decision of said motion for new trial, in which to prepare, file and serve the bill of exceptions herein.

Done in open court.

C. H. HANFORD, *Judge.*

(Endorsed on back:) No. 83, U. S. circuit court, district of Washington, eastern division. William H. Ziegler, plaintiff, *vs.* The Spokane Falls and Northern Railway Company, defendant. Order fixing time for hearing motion for new trial, staying proceedings on judgment and extending time to file and serve bill of exceptions. Filed April 30th, 1892. A. Reeves Ayers, clerk.

29 And afterwards, to wit: on the fifth day of May, 1892, there was duly filed in said court in said cause, a cost bill in the words and figures, as follows, to wit:

In the Circuit Court of the United States of America, Ninth Circuit, District of Washington.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

Memorandum of Costs and Disbursements.

Attorney's fee	$20 00
Marshal's fees	15 00
Clerk's fees	29 70
Superior court costs	3 60

Witness' fees:

Name.	Residence.	Days.			
F. F. Conlon,	Spokane, Wash.	3	2 miles	$4 60	
G. B. Dennis,	"	"	"	4 60	
Adolph Munter,	"	"	"	4 60	
I. S. Kaufman,	"	"	"	4 60	
—— Heath,	"	"	"	4 60	
—— Belt,	"	"	"	4 60	
—— Strack,	"	"	"	4 60	
M. M. Cowley,	"	"	"	4 60	
Walter Hughson,	"	"	"	4 60	
					41 40
Total					$119 70

STATE OF WASHINGTON, } ss:
County of Spokane, }

William H. Ziegler, being first duly sworn, on his oath, says: That he is the plaintiff in the above-entitled action; that he has read the foregoing memorandum of costs and disbursements in said action; that each and every of said items are correct, and that said disbursements have been necessarily incurred therein.

WM. H. ZIEGLER.

Subscribed and sworn to before me, this 6th day of May, 1892.

CHARLES H. WOLF,
Notary Public in and for the State of Washington, Residing at Spokane.

30 In the Circuit Court of the United States, Ninth Circuit, District of Washington.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

To the above-named defendant and to Messrs. McBride & Allen, its attorneys:

Please take notice that at the hour of 10 o'clock a. m. of the 11th day of May, 1892, at the office of the clerk of the above-entitled court, in the Hyde block, in the city and county of Spokane, State of Washington, plaintiff will make application to the clerk of said court to tax the costs against the defendant in the above-entitled suit in accordance with the foregoing memorandum.

Dated this 6th day of May, 1892.

TURNER, GRAVES & McKINSTRY,
Attorneys for Plaintiff.

Personal service of the foregoing memorandum of costs and notice to tax same is hereby accepted this 6th day of May, 1892.

McBRIDE & ALLEN,
Attorneys for Defendant.

(Endorsement on back:) In U. S. circuit court. W. H. Ziegler *vs.* The Spokane Falls and Northern Railroad Co. Filed May 5th, 1892, in the U. S. circuit court. A. Reeves Ayres, clerk, by A. H. Kenyon, deputy. Cost bill.

And afterwards, to wit: on the 27th of May, 1892, there was duly filed in said court in said cause an order on motion for new trial, in the words and figures as follows, to wit:

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILROAD COMPANY, Defendant.

31 On this day this cause came on for hearing, upon the motion of the defendant for a new trial herein, and after argument of counsel, and being fully advised in the premises—

It is ordered that said motion be and the same is hereby overruled, to which ruling the defendant, by its counsel, except-, and its exception is allowed by the court.

(Endorsement on back:) William H. Ziegler *vs.* Spokane Falls and Northern R'y Co. Order on motion for new trial. Filed May 27, 1892, in the U. S. circuit court. A. Reeves Ayres, clerk, by A. H. Kenyon, deputy.

And afterwards, to wit: on the 27th day of May, 1892, there was duly filed in said court in said cause an order extending time to file bill of exceptions, in the words and figures as follows, to wit:

In the Circuit Court of the United States in and for the District of Washington, Eastern Division.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

Now, on this 27th day of May, 1892, on motion of the defendant in the above-entitled cause, it is ordered that defendant in said action have until and including the 25th day of June, 1892, in which to prepare, file and serve its proposed bill of exceptions therein. And in the meantime and until the settlement of said bill of exceptions, it is ordered that all proceedings upon judgment herein be stayed.

C. H. HANFORD, *Judge.*

(Endorsements on back:) In the United States circuit court; William H. Zeigler, plaintiff, *vs.* The Spokane Falls and Northern Railway Company, defendant. Order extending time to file bill of exceptions. Filed in the United States circuit court, May 27th, 1892. A. Reeves Ayres, clerk, by A. H. Kenyon, deputy.

32 And afterwards, to wit: on the 25th day of June, 1892, there was duly filed in said court in said cause a proposed bill of exceptions and notice in words and figures as follows, to wit:

Bill of Exceptions.

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Washington, Eastern Division.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

Notice.

To Messrs. Turner, Graves & McKinstry, attorneys for plaintiff:

Please take notice:—That the within is a copy of the bill of exceptions proposed on behalf of the defendant in the above-entitled cause.

Dated this 24th day of June, 1892.

Yours, &c., McBRIDE & ALLEN,
Attorneys for Defendant.

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Washington, Eastern Division, Before Judge Hanford.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

33 *Bill of Exceptions.*

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" " "B"	48	Patent.
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" " "2"	64	" "
" " "3"	67	" "
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Defendant's bill of exceptions to the instructions of the court ..... 94 to 102

No. 211.
S. F. & N. Ry. Co. } p. 35a
v.
Zeigler.

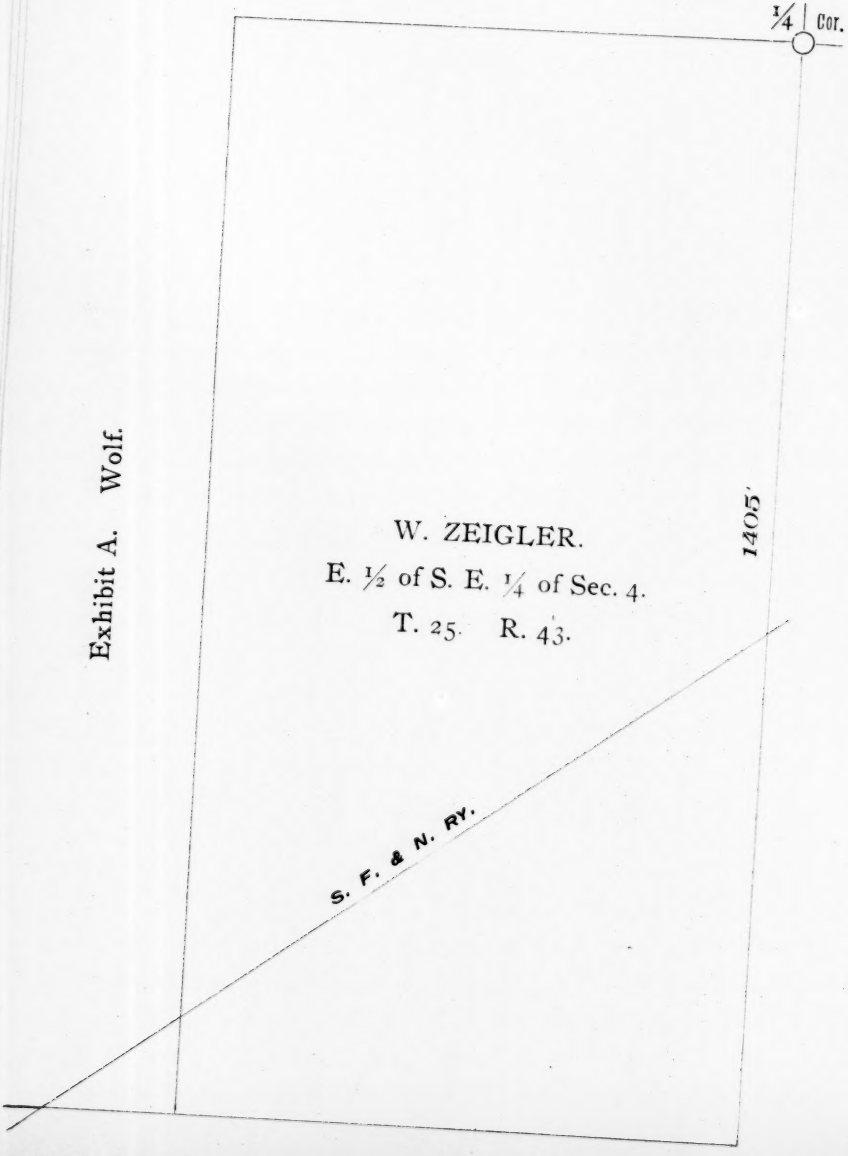

Exhibit A. Wolf.

34 In the Circuit Court of the United States, Ninth Circuit, in and for the District of Washington, Eastern Division.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

The issue in this action came on for trial before the Honorable C. H. Hanford, at the April term of the above court, held at Spokane, Washington, on the 25th day of April, A. D. 1892.

The plaintiff appeared by George Turner and Frank Graves, Esquires, his attorneys, and the defendant appeared by John R. McBride and Robert Allen, Esquires, its attorneys. A jury was duly called and sworn, and the plaintiff by his counsel, opened his case to the jury. The plaintiff, to maintain the issues on his part, called the following witnesses, who testified as follows:

J. W. STRACK being called, sworn and examined as a witness for and on behalf of the plaintiff, testified as follows:

Direct examination:

My business is civil engineer. I have been engaged in that business about eight years; six years of that time in Spokane and vicinity. I am acquainted with the situation of the east half of the southeast quarter of section thirty-four (34), township twenty-five (25) north, range forty-three east, W. M., in this county. It is eighty acres—slightly over; runs eighty acres—and is situated northeast of the city of Spokane about $2\frac{3}{4}$ miles from the corner of Howard and Riverside. I was on that land Saturday, and was also on it today. I made an examination to see the manner in which that tract of land was affected by the building of the Spokane Falls and Northern railroad across it. The railroad enters the tract on the east, beginning at a point 1,405 feet south from the northeast corner of the eighty, and runs diagonally across it, going out at a point on the west line 252 feet north of the south line of the eighty. It does not run through both quarters of the eighty;
35 only runs through one quarter. It strikes into the tract near the northeast corner of the south forty and comes out 252 feet north from the south line. It runs about diagonally across that forty from one corner to the other. (The plat was here shown witness and witness says:) That is a plat of the eighty with the situation of the railroad across it made by actual measurements.

The plat is offered and introduced in evidence and marked as Exhibit "A."

(Here follows map marked p. 35*a*.)

There are no cuts in the road across this land except where it enters on the east line it runs nearly on grade for a distance of something like 250 or 300 feet, then it comes with a fill clear across the entire tract until a point about 200 feet before it comes out on the

west, and the extreme fill, as near as I could estimate it on the ground, is something like four feet. That is the embankment, and then there are cuts made on either side of the track in order to get material for this fill the length of the excavation. It is gouged out somet ing like 2½ or 3 feet in places in order to make the embankment; that gouging out extends all along the entire distance where the fill is made. The fill commences on this forty about 250 feet west of the east line of the forty, and from there the fill extends clear across the forty to where it goes out. I took the elevations of that fill along in different places. In the center of the tract, or about the center as near as I could estimate by making actual measurements for that purpose, it is about a four-foot fill, and then it gradually works lighter as it runs off both ways east and west from that, making an average fill of about three feet. This extreme fill of four feet extends about five or six hundred feet, and then it gradually eases up until it reaches the grade on each side. This gouging out which I spoke of on each side of the track extends along the entire line of the fill in proportion to the amount of the fill made; the greater the fill the greater the gouging. This gouging out extends from 25 to 30 feet on each side of the road. This 80 acres lays upon an elevation having a general slope from north to south. The 40 acres through which the road runs is nearest to the city, and this forty has a gradual slope from the north toward the city. There is one culvert built there near the center of this tract a little west of the center. You would have to extend back from the northward from the top of this fill from two — three hundred feet to reach grade, and in places perhaps a little more. The
36 land to the south side of the fill is very nearly the same contour; the slope is about the same. I was acquainted with real-estate values in this locality in the spring and summer of 1889, and had considerable dealing in real estate, and informed myself of the selling value of property in that locality at that time.

Q. I will ask you to state to the jury what was the value of this tract of land per acre—a fair market value, on the first day of May, 1889, or about that time?

Question objected to by counsel for defendant, on the ground that in an action of this character, the value of the property hasn't anything to do with it. It is simply the original value of the land taken; and in the second place, the plaintiff here has shown by his own complaint that he did not own the title in fee at the time they complain of, and that he had at the most a mere possessory right to it.

Which objection was overruled and an exception allowed by the court.

A. Worth about $800.00 an acre.

I have computed the amount of land included in this right of way, estimating the width of the right of way at 50 feet, and it contains about one and eight-tenths acres.

Q. What would be the number of acres in the right of way for 200 feet of road-bed?

Question objected to by counsel for defendant on the ground that it was incompetent, which objection was overruled.

A. About seven and two-tenths acres.

Q. State what this land is chiefly valuable for.

A. Suburban residence property.

Q. State whether or not the building of this railroad in the manner that you have described it, injuriously effects the balance of this tract?

Question objected to by counsel for defendant as incompetent. Objection overruled and exception allowed by the court.

A. For the purposes which I have stated, for residence property, I should say that it had.

Mr. Allen, counsel for defendant, states: We ask that the witness be confined in his examination to the value of the plaintiff's right to the land immediately before and immediately after the taking.

The COURT: I overrule the objection; answer the question; to which ruling the defendant excepts.

37 A. From the condition that we find there now, I should say the injury is very serious on the north side of the track, because it is almost impossible to get to this land by reason of the fill, unless the streets are graded at considerable expense in order to make a crossing.

For the first tier or two of blocks from this road the land would be very seriously injured, for the reason that nobody wants to live right on a railroad. On the south of course the first tier of blocks would be likewise damaged. The contiguity to the line of railroad is not the only matter I consider as an injury. The railroad runs through the land diagonally and makes it complicated in platting it.

Counsel for defendant objects to the last answer of the witness on the ground that it is improper, which objection was overruled and exception allowed.

Witness proceeds: The railroad would practically destroy the entire strip of lots on either side of the track, in addition to what has already been taken for the right of way, say a strip of fifty feet on either side would be practically destroyed, so that it could not be platted into lots of any reasonable size of practicability; and then, by reason of the fill across the track, that would leave the lots that much below the grade—that is, it would leave the streets below the lots. A grade could be put in there a distance of two or three hundred feet, so that it could be easily crossed; but if the lots were not graded on a level with the railroad they would be below grade. The rails and track, being already four or five feet above the ground elevation, it would require a grade fill for a long distance. In order to make the grade on the south side of the track suitable for a street, you would have to go something like 600 feet.

Q. To what extent, in your judgment, is this land diminished in value upon each side of the track?

Question objected to by counsel for defendant on the ground that the issue is as to the value before and immediately after, and that the witness has not shown himself to be familiar with the question, which objection was overruled.

Q. You have enumerated several particulars in which you thought the building of this road damaged the property on each side. Have you considered also the fact of the damaging of appearances—the jar, noise and dust and smoke—upon its value for residence purposes?

A. No, sir.

Q. What effect do you think that would have upon the
38 property or residence building immediately adjacent to the line?

A. It would have considerable effect upon it. Just what the effect would be in dollars and cents, so far as jar and smoke is concerned, it would be hard to estimate. It would simply have an effect of diminishing the value of the property. I should say this diminishing effect would extend back on each side of the road a distance of 300 feet outside of the right of way. I think it would diminish it to that distance about fifty per cent. Taking into consideration the jarring and running of trains, noise of bells, whistling of locomotives, the dust of moving trains, the fact that the land upon each side would be below the grade of the railroad and the grade of the streets, and that the streets would have to be made to conform to the grade of the railroad, in my judgment, the building of this road affects the value of the lands on the north side for the entire distance. On the south side I don't believe it would be seriously damaged beyond the distance of 300 feet. On the south side it would be necessary to grade the streets down for at least 300 feet, but the grade would be very slight.

Q. Taking into consideration the value of that land and the beneficial uses to which it may be put, to what extent in percentages or values would you say that the land was decreased in value by the road?

Question objected to by counsel for the defendant on the ground that it is not a proper measure of damages, which objection was sustained.

The COURT: The witness must consider the market value of the land at that time, the condition in which it was at that time; consider only such residences and roads and streets as were there, and not such as an engineer might plan and lay out as to be constructed in the future. He may state what the amount of damage is, the damage being then in the market value.

Q. Now, Mr. Strack, considering this land in the condition in which it was at the time this road was actually built on it, and its fair market value in its then condition, and considering all the beneficial uses to which it might be put, how much less valuable was this tract of land after the building of the road than before; and you may state that either in dollars or cents, if you can, or state it in percentages?

39 Question objected to by counsel for the defendant on the ground that all the beneficial uses to which it may be put includes the future. We want it as the land was then and not what time in the future will bring.

Objection overruled and exception allowed.

A. I could not state in dollars and cents, for the simple reason that I have not got the actual number of acres in the tract lying north of the track; but in the percentages I would say, for one tier of blocks, or for a distance of 300 feet north of the north line of the right of way, it was damaged fifty per cent.; on the balance of the tract lying north of this I would say it would be damaged probably 20 per cent of its original value. On the south side I do not consider it would be damaged to any extent at all beyond the limit of 300 feet; that would be about one tier of blocks, and to that extent it would be damaged fifty per cent.

Cross-examination.

By Mr. ALLEN:

In estimating this damage at fifty per cent. for 300 feet on each side of the track, I have been estimating it upon the theory that it would be damaged that much for future use for residence purposes. I figured it on that basis that if I wanted to make a house there I would not give within fifty per cent. of what I would without the track being there. There were no residences on the tract at the time the railroad was built—at least, I don't think so. I made up my mind, or I was of the opinion that at some time in the future it would be used for suburban residences, and when the time came it might be lessened fifty per cent. I have bought and sold land in that locality, in Ross Park, about 150 feet, possibly 200 feet from this land. I bought of the Ross Park syndicate and of my partner. I bought something like eight or ten lots. I bought by the block. I think I bought a year and a half before the railroad went in there. I paid about $4,000 a block. A block contained about 2½ acres. I did not buy or sell any other land in that locality. I have my contract with the Ross Park syndicate; it is on record. I paid them at the rate of $4,000 per block. I sold some of this land I bought. I platted it into lots, and the first lot I sold for $1,000 cash and the other three for $800 apiece. This land I speak of does not adjoin the premises in controversy. The portion I did sell that adjoins on this land, or 250 feet south of this
40 land, I sold for $350. The lot I sold for $1,000 was away off this way further down on the Ross Park Electric street railway. I did not have a block of land up near this tract in controversy; I only had one lot there. I paid $350 for it and sold it for $350. I kept it about a month. That was last winter. I had not bought or sold any land in this vicinity prior to the building of the Spokane Falls and Northern railroad over it except what I bought down on the street-car railway running from here to Ross Park. They were within a block and a half of the street-car line, on the south side of it, between the street-car line and the river, and east

from Mr. Ross' house. The block fronted on the street that runs past Mr. Ross' residence. I never did buy or sell any other land up in *in* the vicinity of this ground in controversy. I actually measured the height of these fills above the level of the ground. The fill is about 4 feet—between 3½ and 4 feet—from the natural level of the ground to the top of the ties in the highest. The four-feet fill is near the center of the tract. I did not make a profile of that line. This four-foot grade extends about 100 feet. I cannot tell you how much of this is a four-foot fill, as I did not consider it of sufficient importance to measure every foot of the fill across there to tell the height of every 50 or 100 feet, but I measured the fill as near as I could without consuming two or three days doing it. I actually measured the fill in two or three places, and found it about 3 or 4 feet. The places I measured were perhaps 100 feet apart. I think I have had some experience in engineering and know the character of the soil out there. I think this grade would necessitate a filling of the streets if any were made across it. The streets are not usually raised above the level of the surrounding ground—not in all places. If there be any cuts or fills they are made as nearly as possible to balance the material, so that the cuts will make the fills. On this particular piece of ground here it grows higher as you go north, so that in the deepest place you would have to start back with the grade some 300 feet in order to reach the top of this fill. That would make the street on a level grade on the north side. If this ground was level and the road started to slope up to the railroad fifty feet back from the track the per cent. of the grade would be 1½ per cent. I think the grade on Division-street bridge is 1½ per cent. A very decent grade could be made starting the slope 50 feet back from the railroad track, but one don't
41 build street grades in that way. It can be built in that way, but you would get an ungainly street in establishing a grade of that kind. In estimating my per cent. of damages at 50 per cent. for 300 feet back from the road and from there of 20 per cent. on the north side I was estimating both forties. The railroad track enters the east line very close to the north line of the south forty. From the railroad track to the north line the distance would be about 1,900 feet.

Q. How many rods would that be—about 90 rods, isn't it; it is 160 rods from there, isn't it; half a mile?

A. Yes, sir.

Q. That would be considerably over 80 rods from here down to that railroad bridge, down to the middle of the track?

A. You can compute it, I did not use rods, I used feet and tenths.

Q. Engineers never use rods?

A. No, sir.

Q. It is one of the standard measurements. Isn't it used in the arithmetics?

A. It was used forty years ago.

Q. About how many rods would it be?

A. I can tell the distance in the first place from measurements on this map. It has a scale of 400 feet to the inch. This land is

damaged to the north side of this 40, a quarter of a mile away from the track by reason of its being hard of entry; by reason of the road being built across the track—very hard job to get across the railroad track without a good road made over it with a good four-foot grade; there is a road graded over the track. You are obliged to cross the railroad on this land in order to get to the north part of town. There are several roads that cross between that and Ross Park. Take the Ross Park road and then go north to this tract. By going north half or three-quarters of a mile you can strike the old country road and go in that way, but you will not take that way because it is out of the road. The nearest way to come to town is by way of Ross Park. You can come to town by going to Avondale, but there is no way to come to town without crossing the track. There is no highway graded across this railroad anywhere on this tract of land. There is a highway that reaches this tract of land by the way of Minnehaha tract, or by way of Ross Park; that highway crosses the railroad near the center of the track at the east line; it crosses at a grade or nearly so. It is a bad crossing; there has no planks or crossings been built. It is not a
42 public road. There are public streets laid out in Ross Park addition, that abuts up against this land; they are opened up, but not graded. The Ross Park Electric railway runs about a quarter of a mile from this land. We cannot go out that way, because there is no way of getting across at present; the only outlet you have got is to go down through that part of Ross Park that is laid out in town lots.

Redirect examination.

By Mr. GRAVES:

This lot I sold for $350 was about 120 feet; it could be about one-fifth of an acre. The block that I paid $4,000 for was a half mile south of the south line of this tract of land. The line of the Ross Park street railway, I should say is about 1,500 or 1,600 feet from this tract of land on the east line; that would be about one-third of a mile. It would not be good engineering for the benefit of the balance of the tract of land, to attempt to grade the streets at a point 50 feet up to a level; no engineer would establish a grade of that kind.

Recross examination.

By Mr. ALLEN:

They did not have to establish grades of that kind on Division street, only to 'commodate the railroad. In this case they would have a very fine street after it goes some distance—the grade itself; it would not drop down and then start up. It would not be a very steep upgrade, 1½ per cent. for fifty feet, but it would make a very ungainly looking street. I do not believe you would have it in front of your building.

Witness excused.

WALTER HUGHSON, being called and sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. GRAVES:

I know the tract of land belonging to Mr. Ziegler, through which the Spokane Falls and Northern railroad runs. The land owned by me is the Arlington Heights property, a platted addition. Our east line is the Ziegler west line, and our south line is the Ziegler north line. It is just south of us, on the east side; it is just east of Broad View addition, and on the east of it is Minnehaha Park; on the south of it is Ross Park addition; these are all platted
43 additions. I should say Ross Park addition runs within one-third of a mile of it. I am familiar in a general way with the manner in which this railroad runs through this tract of land, but I could not state by feet and inches; I have been over it and seen it. It runs diagonally from northeast to southwest. My recollection is that the railroad is above the grade nearly all the way across; I could not state how much it is above grade. The surface of the ground is gouged out some on each side of the railroad bed—I should say from 15 to 25 feet on each side—along the entire length of the fill.

Q. State whether or not the lands in this tract, outside of the land actually occupied by the road-bed and right of way outside of the road-bed right of way, were diminished in value in your judgment by reason of the building of this road.

Question objected to by counsel for the defendant.

Objection overruled, to which the defendant excepts.

A. They are diminished.

Q. Explain to what extent they were diminished by the building of this road, taking into consideration the beneficial uses to which this might be put and the condition in which it is left by the building of the road.

Question objected to by counsel for the defendant.

The COURT: Unless the witness knows the market value of the land at the time it was taken by the railroad he is not a suitable witness to answer such questions.

Q. When did you come to the city?

A. In the spring of 1890.

Q. Were you acquainted with the value of lands in this locality at that time?

Question objected to by counsel for the defendant on the ground that it is incompetent; that it is a year after the road was constructed.

Q. Is this tract of land in the same condition now as it was at the time you came here?

A. Practically so, in reference to this, so far as one could see by personal observation.

Q. Now, I will ask you to state whether or not, assuming the con-

dition of this tract of land at the time this road was built, was the same as at the time you knew it, whether or not the building of the road in the manner in which you have described across the tract of land would diminish the value of the remainder of the tract?

44 Question objected to by counsel for the defendant, which objection was overruled by the court, and to which ruling defendant excepts.

A. Yes, sir; portions of the tract.

Q. In what way did it diminish the value of the tract?

A. This is strictly residence property, and residence property is largely diminished in value on account of a railroad running in front of it, in the first place, and in the second place the land would be diminished on account of the way the road ran through the property. Considering there were two reasons for diminishing the value, the fact the road was there at all and the manner in which it is there would tend to diminish the value.

Q. How far from the line of road on each side does this diminution in value extend?

Question objected to by counsel for the defendant, on the ground that it is incompetent, which objection was overruled.

A. I should say about three hundred feet on either side, that is about the depth of a block; that is, with the understanding that the block faces the railroad, that is, the lot facing, not the lot back of it on the other side.

Q. Would the first consideration you mentioned—the road being there and the manner in which it was there—affect the balance of the tract to any appreciable extent?

Question objected to by counsel for the defendant as incompetent and immaterial, which objection was overruled and exception taken by the defendant.

A. I could not say how far the damage would go outside of the 300 feet; on the other side I think it might extend some distance beyond that.

Witness excused.

G. B. DENNIS, being called and sworn as a witness on behalf of the plaintiff, testified as follows:

Examined by Mr. TURNER:

I have lived in the city of Spokane just about seven years. Since my residence there I have had considerable dealings in real estate. I am acquainted with the real-estate values in the different parts of the city, and was acquainted with their values in the spring and summer of 1889. I was generally acquainted with the value of real estate in the northeast part of town; I own considerable
45 property in that part of town, and have had considerable dealings in property in that locality—that is, in the east-

ern part of the city. I was projector of the Ross Park railroad, which runs in the north and east part of the suburbs of the city. I know the tract of land, the taking of which is the cause of this suit, the 80 acres owned by Mr. Ziegler. I should judge it lays between a mile and a mile and a half from the Ross Park street railroad which we built. I cannot give you the exact distance because it has not been measured by my knowledge. I know where the ground lies; I know how it lies. I know where it is. It may be between a mile and a mile and a half distant; possibly not quite that much distance. I think the Ross Park road was built in 1888 and 1889; I think it was built and in operation in May, 1889. I have seen the land belonging to Mr. Ziegler since the Spokane Falls and Northern railroad appropriated the right of way through it; I saw it on last Sunday. I went over the line where the road crosses it; I saw how the line of road was built through the tract; I could give you the manner of construction, but I do not know as I could give you the length and height in feet. The road is a fill, and runs from the northeast to the southwest diagonally through the tract; it is generally a fill nearly all the way across. The fill varies some; I think at some points it is two and some four feet. There are also some excavations there which I saw that were made for the purpose of taking out the dirt to make the fill, which excavation extended in width anywhere from 12 to 15 and 20, and in some places 25 feet, I think, on each side of the embankment. I should think the embankment was not less than seven or eight feet at the top and 12 or 15 feet at the bottom.

Q. Mr. Dennis, what was the fair market value of that tract of land about May, 1889?

Question objected to by counsel for the defendant on the ground that they are not entitled to prove the value of the land in this case, which objection was overruled and exception allowed.

A. I could give only an individual opinion.

Q. Now, I don't wish—I want your opinion based upon such knowledge as you had of values at that time; understand the distinction between market value—that is, what it would reasonably sell for in the market?

Question objected to by counsel for the defendant on the
46 ground that he has not shown himself competent to speak on the values of this land, which objection was overruled.

A. Well, I should say a fair market value would be anywhere from $600 to $700 an acre.

Q. What effect, if any, Mr. Dennis, did the building of this road through this land in the manner in which you have stated, have upon the balance of the tract as to diminishing its value or otherwise?

Question objected to by counsel for the defendant as not being a proper measure of damages, which objection was overruled; to which ruling the defendant excepted.

A. Various ways. By depreciating the value of the property. I believe a railroad passing through residence property always depreciates the value, and there are other causes—a fill, cuts, dust, smoke.

Q. To what extent did the building of this road, taking into consideration the condition of land at the time of the building of the road and of the beneficial uses to which the land might be put, to what extent in dollars and cents or percentages did the building of this road through there diminish the balance of this tract of land? Explain that in your own words.

Question objected to by counsel for the defendant on the ground that the witness can only take into consideration such uses as the plaintiff himself put the ground to at that time, which objection was overruled and exception allowed.

A. I believe that the damage to the property depends largely upon the manner in which the road goes through the property. The ground immediately adjacent to the track is damaged to a greater per cent. than the ground more remote, so on to the lines of the tract. I can give the damages better in percentages than I could in dollars and cents. I should say that within a depth or distance of 200 feet on either side of the track the damage would not be less than 40 or 50 per cent., and then beyond that anywhere from 20 to 25 per cent. The damage from 20 to 25 per cent. would extend out, I should judge, from 600 to 1,000 feet distant on each side. There might be some damage beyond that, but it would be very small.

Cross-examination.

By Mr. ALLEN:

In estimating this damage I have estimated it as residence property almost entirely. To the best of my knowledge there
47 was no residences on this land in May, 1889, and no enclosures on the place. I think it was a piece of vacant land. I do not think I have been governed in making my estimate by what I would consider it worth in the future for sale as residence property. My opinion of this land was governed by what ground in that vicinity, immediately in that neighborhood, was being asked for at that time. I cannot tell whether the ground in that neighborhood I spoke of had a good title or not. If the title was a good one it could be sold. If I was buying the property, or buying any property, I certainly would not have it at any price unless I could get a good title to it.

Q. Now this piece of ground, if there was no title to this piece of ground except possessory title of a homesteader upon the public land, and by buying it you would have to settle upon it, live upon it for from one to five years in order to create a title so that you could sell it, would it be worth as much as if the title was perfect and you could handle it to suit yourself?

A. That is a matter of opinion. I possibly might choose within

my own mind not to accept that kind of a title, and somebody else might not look at it just as I did—might be willing to accept the title and pay the prevailing price for the property. If it took from one to five years to get a perfect title, and a person had to live on the ground and could not utilize it by selling it or laying it out into lots, it would make a difference to me. Suppose this tract of land you speak of covered by this title was selling at $1,000 an acre, and this was just as good a piece of ground; I should say that piece of ground, irrespective of the title, was worth a thousand dollars an acre, but it is a question with me whether I would be willing to pay $1,000 an acre for it, with the defective title or not. As to answering the question as to whether the ground was worth it or not, I could not say; it would be simply a private matter whether I would pay that money for it or not. I own a tract of land on the east side of town; the Union Pacific railroad runs through the north side of it; I had some controversy with that company over the right of way. It is not a fact that I have sold quite a number of blocks of land and lots close to the railroad for residence purposes for money. I made one trade for another piece of ground in the same addition, and then made a second trade for another piece of ground
48 in the second addition. I did not sell a piece of ground to Mr. Gilbert; I did not sell it to him at all, either before or since the railroad was built. I believe that the advent of railroads into a city generally improves its value. I think that the building of this particular road into the city in the spring of 1889 and the fact that it was known that it was going to be built in the spring, raised the value of property in the northeastern part of the city; that is, I think it had some effect upon the values. It had the same effect in that portion of the city as it had generally over the city. It would be difficult for me to state to what extent the valuation of the lots in the northeast part of town was enhanced by the fact of the construction of this road, I knowing that it was going to be constructed. I don't believe I could do it, in justice to you or myself. Undoubtedly there was some raise in value. There is a fill there on this tract of land of three or four feet in height across a portion of it. I made no examination of this tract of land in the spring of 1889 with a view of ascertaining its market value at that time or the damage to it, and I had no occasion to go near the land or enquire as to its market value—not of this particular piece of land. I did not sell or buy any land in the immediate vicinity of this tract in the spring of 1889. I never bought or sold a foot of land north of the tract of land that I own, known as Dennis and Bradley's addition, in that spring. I did not form my opinion as to what the land is worth upon the future growth of the city in any way; I form my opinion on what I think the land was worth at that time. My opinion was based entirely upon what was being asked for the ground, and not on what the ground was being sold for. While I have not got the same opportunities as a real-estate agent has at getting at a value, I have not been in the market to buy or to sell; I simply base my opinion on what ground was being sold for at that time, or was being asked for. I don't know as I could tell you of anybody who

sold land in that vicinity at that time or previous to that time. I know there was various parties selling.

Q. Do you think that this land, in the condition the title was in at that time, having nothing but the homestead entry on it, with the title yet remaining in the Government, and a contest existing in the Land Office as to who was the owner of it, do you think that land would have sold at that time in its then condition of the title and all, at $800 an acre?

A. That depends upon circumstances.

49 Q. I would like to have your opinion on it, whether it could or not, take it just as it was?

A. If we had a market then that was very strong, and the chances were in favor of this contest being decided in the interest of the parties who claimed to own it, and I thought the real estate was going to change very materially in the near future, I don't know but what I would, especially if I could buy this piece of ground and transfer it again without a person- compromise.

Q. Don't you know, Mr. Dennis, that in order to buy this land and hold it, it would be necessary at that time for the purchaser to go personally on the ground, and reside there and make a home, and make an affivavit to the Land Office that he had settled upon it for his own personal benefit, not for the purpose of speculation, and for no other person or persons; that he had no contract with anybody to sell any portion of it. Now, under that condition or title to this land, do you think a purchaser could be found for it that would pay $64,000 for it, and go there and make a residence upon it?

A. $64,000 for this 80 acres in cash. How do you base your figures on that?

Q. 80 acres at $800 an acre——

The COURT: The witness said $600 or $700.

Q. Do you think the man could have been found that would have made that affidavit and settled upon the land and paid $48,000 for it at that time?

A. Well, it has been my experience in life that most men differ, and that their actions are controlled by their minds. Now, it has been my experience that men differ in life in a case of this kind; I might differ with some other man; I might say I would not accept this title, and somebody else might accept that title, and I might be the man that is mistaken.

Q. Now, Mr. Dennis, you have been called here to give to the court and jury a knowledge of your experience and testify, so to speak, as an expert having a knowledge of this land, and I want you to tell whether you think a purchaser could have been found who would be willing to pay $48,000 for this tract of land, and have gone on it and lived on it, and made this affidavit that it was not for speculative purposes, that he had settled on it, and with the prospect that he would have to live there for six months before he could prove upon it?

A. I will say for myself I do not think I should have taken it. I cannot speak for others.

Q. Would it be available for the market under the conditions I have named?

A. That depends upon circumstances; there were properties with a good deal worse title than that bought and sold in the market.

Q. Here is a title that cannot be sold at all; the only thing the owner could do was to abandon it and let somebody else pre-empt it. Now, a title that is situated in that way, I will ask you if that title could have sold or been sold or transferred at that time so as to bring $800 an acre, in your opinion?

A. Well, I don't know. I, perhaps, would not care to make the contract myself.

Q. Do you know anybody else that would—anybody that had the money?

A. I was not conversant with the market or the people at that time enough to say. I cannot give you the distance from this railroad to the north line of this 80, neither can I tell you how much the north 40 of this 80 would be affected by this road. I should say it was affected some. I think the north 40 is higher up, and the part this road runs through; I cannot tell how near the road comes to this north 40. I simply estimated the ground immediately adjacent to the railroad, and the ground that is more remote, without referring to any particular 40, and I say that the ground adjacent to the railroad is damaged; I don't know anything about the 40 or 80. The way I came to look at the ground on last Saturday, I am one of the trustees of the Jenkins University, and we have located our college back there on the hill. I had been summoned as a witness in this case, and I refreshed my memory, and went and looked it over. I did not go at the request of Mr. Ziegler. I did not really wish to come here and testify in this case. I was also a witness in the case of Conlon *vs.* The Spokane and Northern.

Redirect examination.

By Mr. TURNER:

I don't know that Conlon got a pretty good verdict there.

Q. Mr. Allen has asked you a good deal about the value of homestead and pre-emption rights; I will ask you, Mr. Dennis, in these rapidly growing Western towns a person has a homestead or
51 pre-emption claim to which he has not perfected a title, and it becomes valuable for city purposes, and by relinquishment and transfer of possession to a third person, who, by living on the land three months, can buy it for $2.50 an acre, I will ask you if that is not pretty near as valuable in this Western country as a title in fee?

A. I think so. People have taken chances on getting a perfect title.

Q. Did the projected building of the Spokane Falls and Northern railroad increase the value of this 80 acres proportionally any

more than it did your addition—Cannon's addition—or the value of the land up here on the hill south of town?

A. I think not.

Witness excused.

H. N. BELT, being called and sworn as a witness on behalf of the plaintiff, testified as follows:

Examined by Mr. TURNER:

I have lived in this city about five years. I lived here in 1889. I lived at Ross Park at that time, that is the northeast of town. I was somewhat conversant in 1889 with the values around the city of Spokane; I had considerable dealings in real estate at that time, particularly in suburban property. I was perhaps more conversant with the values in the northern and northeastern part of town and the suburbs of the town than any other. I am acquainted with the 80 acres belonging to Mr. Ziegler through which the Spokane Falls and Northern railroad runs. In the spring of 1889 the markets were pretty active. Probably this land was worth $400 an acre at that time; it might have sold possibly for more; that is, judging from the demand which there was in the locality at that time, and from the feeling that prevailed at that time in regard to the future of the city. This land is very well located. I believe Arlington Heights is on the north of it, but as to the particular locality on the north side of the land, I am not so familiar as I am on the south side. Ross Park land is on the south, and Mr. Libby's addition on the west; Webster's addition, known as Minnehaha addition, on the east side. They are all platted. Ross Park and the whole of Minnehaha was platted at that time, the additions to the south and east; the others, I think, have been platted since. I know something about the way this railroad runs through this land. I don't think I ever followed the track of the road across the land,

52 I know where it enters the land, and have a general knowledge of the lay of the land. I think the general lay of the ground is pretty level, and I should judge it cannot be a very heavy fill nor very much of a cut on any portion of the land; I think I never followed it with a view of testifying in the matter. I think the road is built on a fill pretty nearly through the entire tract.

Q. What was this land chiefly valuable for, Mr. Belt; what valuable uses would it be put to at that time?

Objected to by counsel for the defendant, which objection was overruled and exception allowed by the court.

A. Well, I think the most valuable use it could be put to would be to sell. It could be used for residence purposes; it was suburban residence land. I think the building of this railroad across the tract of land rather depreciates its value for residence uses; I think with most men it would be a depreciation of value.

Q. To what extent do you think that the balance of this tract of land was depreciated in value by the building of this road?

Question objected to by counsel for the defendant, which objection was overruled and exception allowed.

A. It is difficult to say. Take property immediately along the right of way and the depreciation would be greater than as you get further from the line of the road.

Q. Are you sufficiently conversant with the manner in which the road was built through that tract to be able to make an estimate either in dollars and cents or percentages?

A. Well, I could only form a general knowledge; I say I am not familiar with that, because I have not traveled over the track. I have only a general knowledge of the lay of the ground.

Q. You speak generally as to the effect of building any railroad over any tract of suburban property.

A. I am simply giving my opinion.

Q. Give an opinion upon that basis, if you can, as to the extent of the depreciation the property would be if you go a distance from the line of the road?

A. Well, I will say on that matter my mind has been staggered somewhat heretofore as to values near a railroad track. Some people build good residences near railroad tracks and others absolutely object to it. In the judgment of values you would of course have to look all over the field and the different classes of
53 minds who wanted a location. I could not define very definitely the general effect upon the market value of the lands by reason of its immediate vicinity to the road. I only observe people building houses near a railroad track, and I have my own views about it for and against it; but if you desire my opinion about the values, my own opinion is that I would not desire to build a residence near a railroad track, where, everything being equal, I would rather be some distance from it—at least 300 feet from the railroad track.

Cross-examination.

By Mr. ALLEN:

My estimate of $400 per acre in May, 1889, was based upon the proposition that the party having it to sell had a good title.

Q. Assuming the proposition to be this: that the party claiming the land had nothing but a possessory title to it under the preemption laws of the United States and had not yet entered the land, and therefore had no title that he could have transferred, I will ask you what that land would be worth in May, 1889, the person buying it having to settle on it, file upon it and make his home upon it, reside upon it some of the time and take his chances of acquiring his title in the future, I will ask you if that kind of a title to this land would be worth $400 an acre?

A. There is considerable of a legal proposition there.

Q. Does not the question of title have something to do with the land?

A. Certainly.

Q. I am supposing now you started out to sell that kind of land,

with no title except this possessory claim under the pre-emption laws; I will ask you if you could have sold it at that time, or could have sold it for $400 an acre?

A. Well, it would depend—my opinion would be about the question of title.

Q. Supposing a person has to take his chances, the purchaser has got to obtain a title himself, if anybody does, and take his chances on getting it?

A. I am not familiar with the Land Office enough to know what would be necessary for the person to do. If I knew all these conditions and knew the law in the matter I could form a judgment in the matter.

Q. He has got to settle on it in person—make a home; he has got to file in the Land Office a declaratory statement that he settled on it for his own individual purposes, and before he can get
54 a title to it he has got to make an affidavit that he desires it for his own private use and not for speculation, and not for another person; now, with that kind of a title could it be sold for $400 in May, 1889?

A. I do not know that a man could sell it at all. I think the fact that this road was going to be built had a favorable effect upon the values in the city in the spring of 1889, but I could not determine the percentage of increase for the reason there was no doubt a better feeling existing in regard to values. The feeling in regard to values has a great deal to do with the market value. If a man did not feel that he was getting value received he would not want to buy. I do not know that the effect of the proposed building of this road was any better there than in other places about the city. It had an effect certainly favorable to strengthen faith in the city and the future growth; it had something to do with increasing the value of land in that locality. I could not state what this land could have been sold for that spring before it was known this railroad was going to be built. I could not state what the advance would be on account of this particular improvement any further than to state there was evidently a better field for prices or property selling more readily. Just how much more it was selling for I cannot tell. I could not form an intelligent opinion any further than to state it certainly had a favorable effect. I was one of the owners of the Ross Park addition. Myself and other associates in that addition sold a right of way to this railroad. I think it was in May, 1889, we settled for the syndicate. The railroad ran across the corner of the tract about a thousand feet. That tract of ours is nearer to town than this particular tract. It corners on Ziegler tract.

Q. How much did you sell the right of way to the east of the north 40?

Question objected to by counsel for the plaintiff on the ground that it forms no criterion at all; it is an entirely different tract of land, which objection was sustained, and to which the defendant excepted.

Q. Do you say, Mr. Belt, that this land, even assuming that it had

a good title just before it was known that this railroad was going to be constructed, could have been sold for more than $200 an acre just before it was known the railroad was going to be built? I am speaking now in the market for cash at a fair sale. Could it
55 have been sold for more than $200 an acre that spring before it was known that this railroad was going to be built?

A. Well, I could not state whether it could or not, speaking relatively; it is about a year and a half before that, I think, Ross Park lands were sold for $175 an acre, a year before that, I think. There had been a gradual growth that year in prices. It seemed to be a growth in prices from the time and before I bought, because, from what I understand, I paid a very high price when I bought the property at $175 an acre. I think it was a pretty high price at that time. My land came down on both sides of the river. It is about a half of a mile from the Ross Park railroad north to this Ziegler tract of land. My estimate of the land was on the probability that it would in the future sell for enough more to pay a party to invest in it at that price, and it might be used for residence purposes; the values were what we call speculative values. It was some speculation as to what it would be worth in the future. I know a number of people in the city that bought lands expecting to make something in that way that failed on it.

Redirect examination.

By Mr. TURNER:

I know a great many people who bought for speculative purposes and made money on it. This Ross Park property that I bought for $175 an acre advanced very materially. It got up so that lots have been sold as high as $1,000 in Ross Park tract. In the summer of 1889, the lands in Ross Park had increased to as high as $1,200 or $1,500 an acre, take the tract over. From 1888 to 1889 was about as good a market as we have had since we have been here. I do not think the projected building of this road affected this land any more favorably than any other lands in the city as to increasing its value. I think I bought in 1887. I expect it is true that this land I paid $175 an acre for had been purchased one year before from the railroad at $15 an acre, for I paid the railroad company for it after I bought it. There has been a very rapid rise in prices ever since 1886.

Q. Isn't it a fact, Mr. Belt, that when parties hold land under a pre-emption or homestead, the parties who have taken land valuable for suburban residence in the vicinity of rapidly growing cities out on this western coast here, that a relinquishment of one man's right to another man has frequently brought a good price?

A. Well, sir, I have not been familiar with transactions of
56 that kind. But I have an idea that these titles have been regarded as good.

Recross-examination.

By Mr. ALLEN:

Q. Did you say that money has been loaned on a mere preemptor's title?

A. Well, what they call a receiver's receipt. The kind of title I have referred to is after he has entered and paid for the land and got his receiver's receipt. I never had any experience with preemptor's titles; never bought out any homesteader. If I was going to pay $400 an acre for land I think I would want a good title. I do not know anybody it could have been sold to without they had a good title.

Q. Now, Mr. Belt, you say something about an increase and appreciation of property from 1886 to 1889. I will ask you if the principal raise across the river did not occur in 1889, when it was known that this railroad was going to be built.

A. About that time there was a very strong feeling in prices; property that was offered, sold for much better prices than it could have been sold before it was known that the railroad was going to be built. It advanced generally.

Q. Was not the general advance that spring on account of the proposed construction of this road?

Question objected to by counsel for the plaintiff, on the ground that this has been gone over once before, which objection was sustained, and defendant excepted.

Witness excused.

I. S. KAUFMAN, being called and duly sworn, testified on behalf of the plaintiff as follows:

Examined by Mr. TURNER:

I have lived in this city nine years in May; I have been engaged in the real-estate business all the time since living here. I was acquainted with the value of real estate in the northern part of the city and the suburbs of the city in the year 1889. I know the 80-acre tract of land belonging to Mr. Ziegler upon which the Spokane Falls and Northern runs.

Q. What was the fair market value of that tract of land in May, 1889, and about that time?

Question objected to by counsel for the defendant upon the ground that the plaintiff did not own the land at that time; the
57 measure of damages is not the market value of the land, it is simply the rental of it; which objection was overruled, to which defendant excepts, and exception is allowed.

A. I do not know of any selling in that immediate locality, unless it was in Minnehaha tract. The land was rated in that locality from probably $400 to $600 an acre. I have been on this tract of land and have seen the manner in which it is intersected by this railroad. I think it runs through the south 40, diagonally across

the 40. I think most of the way the road is above the level of the ground, ranging somewhere from two to three and three and a half feet. I never examined it accurately. I do not think I saw any places where the grade was quite as high as five feet. I heard the engineer's testimony yesterday, and I think he estimated it at three and a half; I should think that would be about the height. I should think it would average from two and a half to three feet across the tract. I did not notice as to the excavations along the side of the road-bed. I think it was the condition of the real-estate market that gave this land such a value; it had been considered desirable for suburban residence property.

Q. Was there platted lands around it at that time?

Question objected to by counsel for the defendant, on the ground that it is immaterial, which objection was overruled and to which defendant excepted.

A. Ross Park tract, the northeast addition to Ross Park, was platted at that time. I am not sure whether Minnehaha was platted at that time or not. Minnehaha is Mr. Webster's addition. Arlington Heights, directly north of it, was not platted at that time, and I think Mr. Libby's tract was not platted at that time, but I am not positive about it. He might have had his survey made, but I don't think it was platted.

Q. What effect did this railroad have on this tract of land, on the balance of the tract?

Question objected to by counsel for the defendant, which objection was overruled and exception taken.

A. I should think it had damaged the value of the land in that immediate vicinity to the distance of probably a block or 300 feet on each side of the tract. But as to whether it had damaged it beyond 300 feet, I would answer the question in two ways:

58 When you speak of the injurious effect upon the market value, I think it might have a tendency to prevent certain ones from buying, but beyond that distance I should not think a man would expect to pay any less for the title.

Q. To what extent would the value be diminished upon each side for a distance of 300 feet?

A. That is a difficult question for a real-estate man to give. I find that there are men who are willing to live near a railroad track and others who object. I should think in the immediate vicinity it depreciates the value of the land probably 20 to 25 per cent. I think beyond 200 feet that land would sell for just as much as though the road was not built, although maybe not so readily. It might delay the sale. There might be other conditions that would enter into the opinion of parties; there might be other conditions that would overbalance the injurious effect of the road. I think probably the building of the road would be a barrier in the way of some purchasers. I think it would depreciate the market value of the entire tract, in the way of delaying the sale. People would not

buy it so readily; but I do not think it would depreciate the value of the entire tract, but only in the immediate vicinity.

Q. It would depreciate the selling value of the entire tract beyond a distance of 300 feet; people would not desire to buy, would they?

Question objected to by counsel for the defendant, which objection was overruled by the court, and exception taken by the defendant and allowed.

A. I think for a certain distance it would become a barrier to the sale, but after you get a certain distance away I do not think it would make any difference. I think it would not make any difference beyond 300 feet as to the desirability of a sale. I think there are some people it would make a difference to. It would make a difference to probably a distance of 300 feet. I came from a railroad town to Spokane—railroads running in almost every direction, and you could hardly live there without living within a certain range of a railroad track. Some of the finest houses we had in our city were not more than a block or two blocks away from the railroad. That was in Decatur, Illinois. It is a fact that out in this western country, with this improved method of transportation, there is a great demand for suburban residences. I think it is a fact
59 that to a certain extent a railroad coming near a property depreciates it to a greater extent than it would back further, but there might be other conditions that would carry it in that direction. I notice in other cities where they have facilities for transportation of passengers these suburbs are built up. The fact that a railroad was built near a tract would render it more desirable than if it was not there. I think that the building of the railroad affected the value as to one 40, but not as to the entire 80.

Cross-examination.

By Mr. ALLEN:

I came from a railroad town, and it is a fact that there were a great many railroads there and a great many nice residences were built along the railroads. It is also a fact that in a good many large cities along the lines of railroads people have settled and built near the railroad on account of being able to get transportation to and from the city, and it is also a fact that where there is business done the ground immediately near the tract is frequently used for warehouses, stores and things like that. If there was a considerable settlement there, there might be business in that locality. It might bring business to a limited extent in that locality. I did not fix this value from $400 to $600 at any definite time in 1889. Really when I answered the question I did not have any fixed time in my mind. I do not really remember as to when the railroad was built. I would fix a value, the price of the land higher in 1889 perhaps. There was a very rapid rise in market values all over the city in 1889.

Q. I will ask you if this activity did not commence at the time

it was known that the railroad was going to be built and have the depot on that side.

A. I really do not remember as to that, whether it was at that time the activity commenced or not.

Q. Now, what effect did the knowledge on the part of the public that this railroad was going to be built and make a depot on the north side of the river have upon the market values in that locality?

A. It had a beneficial effect. It would be a difficult question to answer how much the value of land in that locality was appreciated on that account during that spring. We considered the Spokane and Northern as a Spokane road, and reaching a country naturally tributary to our city, and we eventually expected it to make a connection with the Canadian Pacific, and it made an appreciable effect upon the market value of the real estate upon that side. I
60 think the building of the Spokane and Northern and the Ross Park Electric line had an effect in that part greater than in any other part of the city. I think that the railroad was the principal factor in making that increase in value and creating a good feeling in the market.

Q. Now, was this estimate that you have given, from $400 to $600 an acre, the value of this land before it commenced to increase on account of the building of this road or after it had appreciated by the knowledge of the building of this road.

A. I think it would have sold probably for more after the knowledge of the fact that the road was going to be built than it would prior to that time.

Q. I want to find out whether this value that you fi- from $400 to $600 was the value of the increased market caused by the knowledge of the building of the road or before the knowledge of the building of the road was known.

A. I think the value of the land—the value I gave—was fixed after it was known that the road was going to be built.

Q. Now, how much would this tract of land have been worth that spring per acre before it was known that the Spokane Falls and Northern railroad was going to be built, or it was known that they were going to have a depot on the north side? I am now speaking of the market value; if a man wanted to sell and did not have to sell and a man wanted to buy and was not obliged to buy?

A. I really do not know what the land would have sold for before that spring, because I never dealt in land except a very little, and a good while prior to that, further out from the Ross Park tract—further north. I think with a good title this tract of land could have been sold for $200 an acre prior to its being known that spring that this railroad was going to be built and a depot built on that side of the river. I cannot say it was worth any more than that prior to that spring. The values that I have given have been based upon the proposition that a good title could be given. I do not think this land could have been sold at $400 an acre at the time the railroad went on it if the claim was a mere possessory claim under the pre-emption laws, and the only title he could get would be an

assignment of the claim, and he would have to take his own chances of getting title in the future. I think the man purchasing it would be so situated that he would want to go and make his home.

61 If a man was so situated that he wanted to go and live on the property and get the relinquishment, that might be satisfactory to him; but I think these circumstances would depreciate the market value. It would be very hard to tell what the claim was worth in the market with that kind of a title. I think it could have been sold for $100 an acre.

Redirect examination:

It is a fact that where lands are held by homesteaders or pre-emptors near our rapidly growing cities, they can sell their rights by means of relinquishment.

Q. And where they are thus made title may be got by six months' residence and two dollars and fifty cents an acre, and that they answer the purpose to such as a title in fee?

Question objected to by counsel for the defendant which objection was overruled, and to which the defendant excepts and exception allowed.

A. I think there has been property conveyed in that way. I do not know anything about the market price, I never made any sales of that kind. These homestead and pre-emption claims very frequently sell to persons who want an investment pretty nearly at their market price.

Q. Do you mean to be understood, in answer to Mr. Allen, that property appreciated 100 per cent. in this city by reason of the knowledge of the fact that the Spokane Falls and Northern railroad was going to be built?

A. No, sir; I did not that alone.

Q. Is not it a fact that property began to appreciate on the building of the Palouse railway here?

A. Yes, sir.

Q. Did the knowledge of the building of the Spokane Falls and Northern railway have any more appreciable effect on this land than any other land here?

A. No, I think the property on the north part had increased a little more on account of the depot being there.

Q. Did this land appreciate any more in percentage than the lands up on the hill south of town?

A. I think not.

Q. So far as there was any appreciable increase in the fall of 1889 in property north of the river, didn't it arise from the building of the Ross Park street railway?

A. That helped the property in the immediate locality very materially.

62 Q. How long had it been known that this road was to be built before they actually began to build it?

A. I don't remember.

Q. Several months?

A. I don't remember; I think it was early in the spring that we raised a subscription as a subsidy for the road, and I do not remember the month.

Q. Was there any more appreciable increase in values on account of the knowledge of this road being built than on account of the knowledge of the Great Northern coming in here?

A. I don't know; there was a greater increase in values that spring than this; I can't say that the building of the Spokane Falls and Northern alone made that increase. There has been no increase in values since the knowledge that the Great Northern was coming in. The knowledge of the fact that the Great Northern is coming has tended to strengthen and to increase faith in the market; I think eventually the Great Northern coming in will increase the values.

Q. Isn't it a fact that the knowledge of the building of the Spokane Falls and Northern did more to strengthen values than to increase them?

A. I think then it had a tendency to increase them. I think if the conditions were right they would not only strengthen the values materially, but increase or enhance them. The condition then was: there was a market at that time.

Q. If the same existed now the same result would follow?

A. I think so.

Q. Then the increase in value was chiefly on account of the better condition of the real-estate market at that time?

A. It was the faith the people had in the growth of the city; it commenced in 1886, at the time of the building of the Spokane and Palouse road, and continued steadily after that; I think it was during the summer of 1886; it is my recollection; I don't remember just when the Spokane and Palouse railroad was built.

Q. Now, did the building of this road, of the knowledge of the building of this road, increase the value of this particular tract which it did not cross?

A. I think not.

63 Recross-examination:

Q. Mr. Kaufman, I will ask you to state how much less, in your opinion, this 80-acre tract of Mr. Ziegler was worth immediately after the road was built through it than it was that spring before the road was built through it, and before the knowledge on the part of the public that the road was going to be built.

A. I don't think it was worth any less. It was worth just as much as it was that spring before the knowledge that the road was going to be built. There was enhanced values all over the city.

Q. You think that the enhanced values were very largely caused by the fact that the railroad was going to be constructed?

A. That was one of the things, no doubt.

Redirect examination.

By Mr. TURNER:

Q. You think that the building of this road through that land damaged it, Mr. Kaufman?

A. Yes, I think it did damage the ground which it runs through.

Q. Any increased values that might have been caused by building of this road was such as this land enjoyed in common with other lands?

A. Yes, sir.

Witness excused.

WILLIAM H. ZIEGLER, being called and duly sworn as a witness, testified as follows:

Examined by Mr. TURNER:

I am the plaintiff in this case.

Q. When did you enter upon this tract of land described in the complaint for the purpose of entering under the pre-emption laws?

Question objected to by counsel for the defendant on the ground that it is incompetent; the declaration of declaratory statement filed by him is the best evidence of it—the one he filed in the land office is the best evidence; which objection was overruled and exception taken.

A. December 12th, 1884. I entered in the capacity of a pre-emptor under the pre-emption laws. I filed my first paper on December 12th, 1884. I lived upon the land about fourteen or fifteen months.

Q. Did you make final proof upon the land?

64 Question objected to by counsel for defendant upon the ground that if he made any final proof it is in the Land Office, and the records of the Land Department are the best evidence; which objection was overruled and exception allowed.

A. I did, June 18th, 1887.

Q. At that time did you make any tender of the purchase price to the officers of the Land Office?

Question objected to by counsel for the defendant on the ground that it is immaterial; which objection was overruled, and exception allowed.

A. Yes, sir.

Q. How much?

A. $2.50 an acre; $200; something like that for the 80 acres.

Q. Did you subsequently get a patent upon your final proof?

A. Yes, sir.

Q. Have you that patent with you?

A. Yes, sir.

Patent offered in evidence by the plaintiff. Objected to by counsel for the defendant on the ground that it was made two years after

the land was taken possession of by the railroad company; it is incompetent and irrelevant; which objection was overruled and exception allowed the defendant. Thereupon the patent was introduced in evidence and marked "Plaintiff's Exhibit B."

"EXHIBIT B." (4–407.)

UNITED STATES OF AMERICA:

Certificate No. 2781.

To all to whom these presents shall come, Greeting:

Whereas, William H. Ziegler, of Spokane county, Washington, has deposited in the General Land Office of the United States a certificate of the register of the land office at Spokane Falls, Washington, whereby it appears that full payment has been made by the said William H. Ziegler, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," and the acts supplemental thereto, for the east half of the southeast quarter of section four, in township twenty-five north of range forty-three east of Willamette meridian, in Washington, according to the official plat of the survey of the said lands, returned to the General Land Office by the surveyor general, which said tract has been purchased by the said William H. Ziegler.

Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said William H. Ziegler, and to his heirs, the said tract above described: to have
65 and to hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature thereunto belonging, unto the said William H. Ziegler, and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

In testimony whereof, I, Benjamin Harrison, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the twenty-fourth day of March, in the year of our Lord one thousand eight

hundred and ninety-one, and of the Independence of the United States the one hundred and fifteenth.

By the President:

BENJAMIN HARRISON,
By ELLEN MACFARLAND,
Ass't Secretary.

[SEAL.] J. M. TOWNSEND,
Recorder of the General Land Office.

Recorded vol. 4, page 344.

Q. Were you a citizen of the United States when you initiated this pre-emption right?

A. Yes, sir; I was born in the United States. I was 21 years old at the time I was initiated this right.

Q. Mr. Ziegler, what was the value of this tract of land in the spring of 1889?

Question objected to by counsel for the defendant on the ground that witness has not shown himself competent to answer.

The COURT: You may answer the question as to the market value.

To which ruling of the court exception was taken by counsel for the defendant and allowed.

A. Several parties approached me, wanting to buy it, and formed syndicates to buy it.

The COURT: It is not necessary to state what they said about it. State, if you know, what the market value was, in a general way, based upon your knowledge of its value, if you have any.

66 A. Well, there was not any land around there that was selling for less than $600 to $800 an acre.

Defendant's counsel by counsel ask that the answer be stricken from the record, which motion was denied by the court and excepted to by the defendant and exception allowed.

Cross-examination.

By Mr. ALLEN:

In the spring of 1889, the time this road went across this land, I had a cabin there and had about five acres broken and set out in fruit trees. I had this five acres fenced to protect my trees; I was trying to protect them; that was all the improvements I had on the 80 acres. The railroad went through a corner of my inclosure. I think it took off about a quarter of an acre; I am not positive; never measured it exactly; I think about a quarter. My fence was a barbed-wire fence.

Witness excused.

ADOLPH MUNTER being called and sworn testified on behalf of the plaintiff, as follows:

Examined by Mr. TURNER:

I have lived in Spokane since 1884, and have been engaged in the abstract, real-estate and insurance business continuously. For two years during that time, or nearly two years, I did not myself take an active part in the real-estate part of my business, but the balance of the time I did. I was informed all the time as to the values of real estate in and around Spokane. I know the tract of land belonging to Mr. Ziegler through which the Spokane Falls and Northern railway runs.

Q. What is the value of that land?

Objected to by counsel for the defendant on the ground that the witness has not shown that he knows anything about the value in 1889, which objection was overruled by the court and exception taken by counsel for the defendant and exception allowed.

Question by the WITNESS: In the spring of 1889?

A. Yes, in the spring of 1889.

WITNESS: From $800 to $1,000 an acre. I don't know exactly how the Spokane and Northern runs through the tract; I know about how. Assuming that the railway runs through that
67 tract diagonally from the corner of one forty to the diagonal corner of the same forty, intersecting the forty diagonally, and that it is on the south forty, and on a grade of from two to four feet, it would diminish it considerably.

Q. How much; give us some estimate, so the jury can make some conclusion as to how much you think it diminished it.

Question objected to by counsel for the defendant on the ground that the witness be confined to the market value before and after the railroad was constructed; which objection was overruled and exception allowed.

A. It would be about thirty per cent. There would be a decrease of thirty per cent. in the value of the land—in the value of the entire 40. In reaching that conclusion I took into consideration the necessity of having to cross the railroad track in reaching the property from the city; also the facts that the building of the road on an elevation like that mentioned up to 4 feet would injure the streets, and not make it as suitable for streets and the property adjoining on the streets as valuable, because the view on the streets crossing the railroad would necessarily be impaired, which is something that always interests a street. Also the effect in respect to the property itself which is very close to the railroad tract; people with families would not like to buy or live on lots adjoining a railroad tract on account of its being dangerous for their children playing around; besides, as to the property close to the tract, the mere noise of trains passing through there. The property near the tract would be injured more than that further away. I think a fair average of depreciation over the entire 40 would be thirty per cent.

Cross-examination.

By Mr. ALLEN:

I don't think I have ever crossed the tract there on that land. I don't think I have ever taken particular notice of the manner in which the tract is built. I base my figures as to the depreciation of value on the value it would have as residence property without the railroad and with the railroad, and also what it would have lost in per cent. Any person buying it would naturally take all these points into consideration in purchasing it, and the purchaser would be apt to take into consideration what the lots near by were worth. The price I fixed on this land I think was the price any time between the months of March, May or June; that would have been
68 about the value of the land according to the best of my recollection. It was worth that in June. I don't know that there was any special advances in that locality during that spring. I remember only a general advance at that time. There had been in fact an advance that had commenced here several years before from property gradually advancing more. I don't recollect that there was any particular advance that spring. I did not sell anything in that locality myself; I did not buy anything in that neighborhood—not close by. I bought some in the spring of 1889 or the fall of 1888 in Sinto addition; I don't remember exactly the time.

Witness excused.

M. M. COWLEY, being called and duly sworn as a witness on behalf of the plaintiff, testified as follows:

Examined by Mr. TURNER:

I have lived in this county continuously for about 20 years, about 17 years at Spokane Bridge above the river here and three years here. I have been familiar with the real-estate values in Spokane ever since the town started through other persons. I have had dealings in real estate here myself most of that time and have known something about the market here—the real-estate market. I know the tract of land belonging to Mr. Ziegler through which the Spokane Falls and Northern railroad runs, and have seen the way in which the road runs through the tract; it runs from one corner to the other of the forty. I did not notice as to whether it was built on an elevation above the surface of the ground. All that I noticed was where I was standing, about the center of the tract, was about four feet, I should judge, of a raise. I could not say as to how far the elevation appeared to extend on each side of that.

Q. What, in your opinion, was the fair market value of that tract of land in the spring of 1889.

Mr. ALLEN, attorney for the defendant: We ask that the witness be confined to the time prior to the road going on it—the spring of 1889; prior to the 1st of May.

A. What the market value was then?

Q. Fair market value; yes, sir.

A. I should say about $700 an acre. It was chiefly valuable at the time as an addition to this town.

69 Q. What effect, if any, did the building of that road through there have upon the value of that tract of land outside of the land actually taken.

Question by the witness: As an addition to the town?

Question objected to by counsel for defendant on the construction put upon it by the witness, which objection was overruled.

Q. For any purpose—any one purpose for which it might be used.

A. Well, I will have to qualify that answer.

Q. For any purpose for which you would value it?

A. I would value it from five to six or seven hundred dollars an acre?

Q. What was the effect of the building of that road in the manner it was built on the land in increasing its value or diminishing its value?

A. It would diminish the value.

Q. To what extent?

A. There I will have to qualify again, or else I cannot answer the question. If I am figuring on agricultural land I would have to say what damage it did to that.

Q. Was that agricultural land?

A. It was land that would grow potatoes.

Q. Considering it for all useful purposes to which it might be put?

A. If you say all useful purposes, that means the most useful purpose it could be put to?

A. Yes.

A. The most useful purpose it could be put to was to sell it for suburban lots. If I was valueing it for suburban lots for building a house there to live on I would value the lots a block away from the railroad 50 per cent. higher than I would the lots on the railroad, and two blocks away from the railroad about 25 per cent. higher; that is about the value I put on it. I would put 50 per cent. depreciation on the first blocks adjoining railroads, and the second blocks 25 per cent.

Cross-examination.

By Mr. ALLEN:

The soil is a gravel soil, and I think it would raise potatoes; it is a good potato land. I am speaking of values for the year 1891. When I spoke of the value in 1889 I was speaking of the value for what they were going to use it for at that time. It was the general supposition that they were going to use it for that purpose at that time.

70 Q. Now, Mr. Cowley, if the man who owned this land had nothing but a possessory title under the pre-emption law, had not yet proved upon it and had not yet his final receiver's receipt, and the title to this land was then in the Government, could it be sold in lots for suburban residences? How much would you give for that kind of a title for a block of land?

A. If a man did not have a title to the land I would not buy it at all.

Q. And this price you have fixed upon it is on the assumption that the title was perfect?

A. It was on the assumption that the person who sold the land had a good title. I would not consider it from him to me if he had no title.

Witness excused.

THOMAS F. CONLEY, a witness, being called and duly sworn, testified on behalf of the plaintiff as follows:

Examined by Mr. TURNER:

I have lived in the city of Spokane a little over eight years. During that time I have been conversant with real-estate values in and around the city of Spokane, and have bought property in the northern part of the city and own property there now, and it is in the same direction as the Ziegler land. I am acquainted with the Ziegler 80-acre tract; I had been on it since the road was built, and have seen the manner in which the road is constructed across it. It runs diagonally through the south 40 acres; the road is raised above the land most the entire length.

A fair market value of that tract in the spring of 1889, prior to the first of May, was between $600 and $700 an acre. The features that gave it the value that I have fixed on it in the spring of 1889 are that it was good suburban-residence property. The construction of the railroad across it would diminish its value. I would say that the land would be depreciated in value the first hundred feet outside the right of way at least 75 per cent.—that is on each side of the right of way, and for 300 feet beyond this on each side again it would be diminished or depreciated 50 per cent.; and probably that part lying north of the road to the north line of the property would be depreciated 10 per cent. The elements of depreciation that I take into consideration in making this estimate

71 was the fact that the road runs through above grade; that there are no crossing at present left over the road to reach the northern part of the land; and then again, the unpleasantness of a railroad running near the property that people would build on.

Cross-examination.

By Mr. ALLEN:

The value that I put upon this property is for suburban property, suburban residences. I own a tract of land in that locality.

My land is north, a mile distant from the Ziegler tract. It is nearly a mile nearer town than the Ziegler tract. I did not sell any land in that locality in the spring of 1889 nor before that. I have sold some since. I sold none during the summer of 1889; sold none on the north side of the river in 1889. I did not buy any during that year. In fixing the prices that I have, my estimate is based on the fact that the land was suitable for suburban residence at that time. I think it might have been sold for that purpose at that time. There is about a mile of vacant land between the Ziegler land and the little town of Denver. A big share of it was vacant. A big share of it is still vacant. There were a few buildings on the land to the west of it in 1889. It was unoccupied for miles, with the exception of a few buildings. There were some buildings to the north of it in 1889—not a great many. There were just a few buildings scattered around on the various tracts of land that the people owned. The land east of it was vacant.

Redirect examination.

By Mr. TURNER:

The land that I spoke of as being vacant, I think the most of it was platted into additions to the city. I think the northeast addition to Ross Park was platted before that time, and that addition abuts on this land on the south. Minnehaha addition had been platted on the east of the Ziegler tract. There has been considerable property sold in both of those additions. There was a good demand in that year for lots in all suburban additions around Spokane, and property was selling readily.

Recross-examination.

By Mr. ALLEN:

This demand for property, if I remember correctly, commenced in the latter part of the year, before the fall. I do know that there was a good demand before the fall, and it increased in the
72 spring. It increased in the spring of 1889 quite materially. The boom that this railroad is going to be built by that — caused a demand for property. The prices that I have fixed are the values at the time *time* the road was built through there. The building of the Spokane and Northern helped the sales. I do not know that the building of the Spokane and Northern helped the prices, except that it created a demand for the property. I do not know that the prices were advanced. I do not think they were advanced.

Witness excused.

ADOLPH MUNTER, recalled by the plaintiff and examined by Mr. Turner, testifies as follows:

Q. Mr. Munter, in your experience in real estate in this city, you have had experience in real estate in this city, have you had expe-

rience in and noticed the value of possessory titles under the land laws of the United States and under homestead and pre-emption laws?

A. Yes, sir, I have occasion to notice them.

Q. What effect, if any, in fixing the value of this 80 acres of land would you attach to the fact that in the year 1889, Mr. Ziegler had made his final proof and tendered his money but had not at that time been accepted, but subsequently was accepted?

This question was objected to by counsel for the defendant on the ground that it is incompetent and irrelevant, and not the question as to what effect such a state of facts would have upon the value of the 80 acres, but what the market value of the 80 would be under such circumstances, and with a title in that condition.

The objection was overruled, to which the defendant excepted.

A. If the title was in that condition at that time he could not have got any; a person could only buy the right to make and entry on there, the property would not have been worked by 20 per cent. as much as though he had been able to sell the property absolutely and in fee-simple. I do not think the difference would have exceeded 20 per cent.; it would have been about that.

Cross-examination.

By Mr. ALLEN, for the defendant:

The fact that the purchaser would be obliged to live on the
73 place, file in the land office, and eventually prove upon it, would not very greatly lessen the number of purchasers that a person could find; not as to property as near to town as it is; it would not as materially lessen it as it would. My statement was simply based upon the assumption that the relinquishment on the part of the seller would enable the purchaser to make an entry upon it; I did not take into consideration any contest with reference to the possessory right.

Witness excused.

WILLIAM H. ZIEGLER, plaintiff, recalled and examined by Mr. Turner:

The first decision in the local land office upon the contest filed against me was in Dec. 1887; I am not positive as to the date, but I think it was settled in the General Land Office in the fall of 1888 or on January, 1889. I am not clear on that date, that is my recollection.

Cross-examination.

Mr. ALLEN:

The appeal was to the General Land Office; it did not go to the Secretary of the Interior. I think I paid the money for final entry in January, 1890. They notified me to come forward and pay; and I think it was on the 15th of March, 1890. It was

in 1890. My recollection is that the decision of the Commissioner of the General Land Office confirming the decision in the land office here was made in the fall of 1888 or the spring of 1889. I don't think it was made on the 19th of November, 1889; I cannot swear positively on that date. The contest against my claim was filed in the land office in June; it was filed after I had applied for final proof and before the time for hearing, and before the land office set the fixed time for hearing. The time for hearing was June, 1887; it was about the 24th of June. I made the tender to the receiver of the land office; his name is Barney; I tendered the money—$200. I made the tender at the time of making my final proof, June the 18th, I think. I think I made my final proof on June the 18th. I went in there to make my final proof on the 18th of June, and tendered this money to Mr. Barney, who was the receiver; he did not take the money; I did not leave the money with him, and I did not take any paper showing I had tendered the money. I do not remember now who was present when the
74 money was tendered; my witnesses were there; my attorney then was T. C. Griffith. I made the tender in person.

Redirect examination.

By Mr. TURNER:

At the time of making the tender I paid the fees; there was just 80 acres, and I tendered just $200.

Witness excused.
And here the plaintiff rested his case.

And to sustain the issues on the part of the defendant the defendant first read in evidence a certified copy of the articles of incorporation of the Spokane Falls and Northern Railway Company, certified by the county auditor of this county, which was admitted in evidence and marked "Defendant's Exhibit 1," and the same read as follows, to wit:

"STATE OF WASHINGTON, } ss:
County of Spokane, }

"I, J. J. L. Peel, auditor, in and for Spokane county, Washington, hereby certify that the within and foregoing instrument, articles of incorporation of the Spokane Falls and Northern Railway Company, is a full, true and correct copy of the original thereof, which was filed for record in my office on the 17th day of April, 1888, at 4 o'clock p. m., as appears from said original on page 341 of Miscellaneous Record 'B.'

"In witness whereof I have hereunto set my hand and affixed *that* official seal, at the city of Spokane, this 25th day of April, 1892.

"J. J. L. PEEL,
"*Auditor of Spokane County, Washington,*
"By W. H. HOSLER, *Deputy.*"

"*Articles of Incorporation of the Spokane Falls and Northern Railway Company.*

"Know all men by these presents, that we, the undersigned, had this — associated ourselves together for the purpose of forming, and we do by these presents form, and agree to become an incorporation under and by virtue of the laws of the Territory of Washington, and to that end we do hereby certify—

75 First.

That the name of the incorporation shall be The Spokane Falls and Northern Railway Company.

Second.

The objects for which this corporation is formed are: First. To build, equip, run, operate and maintain a railway from the city of Spokane Falls, Spokane county, Washington Territory, to some point on the Columbia —, in Stevens county, Washington Territory; also to build, equip, run, operate and maintain branch railways and extensions of said railway from any point on said railway to such other points or places in the Territories of Washington, Idaho and Montana, as shall be determined from time to time by the trustees of said corporation. Second. To construct, maintain, operate upon the line of said railway or branches, telegraph and telephone lines or to contract with telegraph or telephone companies for the construction, maintenance and operation of such telegraph and telephone lines.

Third.

To build, equip and operate steamboats upon the Columbia river and such other navigable streams or lakes in the Territories of Washington and Idaho and in British Columbia as shall be determined from time to time by the trustees of the said corporation, or to contract with any other corporation or with private individuals for the purchase, construction or operation of steamboats as aforesaid.

Fourth.

To borrow money for the purpose of said corporation on bonds, notes, bills, acceptances or otherwise at such rate of interest and upon such terms as the trustees of said corporation shall deem best for the interest of said corporation, and to secure the payment of same by mortgage or mortgages upon the property of said corporation, including its franchises, or upon any part thereof, or by such other security or securities as the said board of trustees may determine.

Fifth.

76 The amount of capital stock of this corporation shall be two million five hundred thousand dollars ($2,500,000), divided into twenty-five thousand (25,000) shares of the par value of one hundred dollars ($100) each.

Sixth.

The term of existence of this corporation shall be fifty (50) years from and after the date of its incorporation.

Seventh.

That the number of the trustees who shall manage the concerns of this corporation thall be thirteen (13), and the names of those who shall so manage the concerns of said corporation from the date of its incorporation until the sixteenth day of July, A. D. 1888, are:

A. F. Jefferson of Hudson, Wisconsin;
James Monaghan of Spokane Falls, Washington, W. T.;
C. B. King of Spokane Falls, W. T.;
James N. Glover of Spokane Falls, W. T.;
Frank R. Moore of Spokane Falls, W. T.;
W. H. Taylor of Spokane Falls, W. T;
B. C. Van Houten of Spokane Falls, W. T.;
J. Z. Moore of Spokane Falls, W. T.;
D. C. Corbin of New York;
F. J. Brickell of Spokane Falls, W. T.;
Warren Hussey of Spokane Falls, W. T.;
J. J. Browne of Spokane Falls, W. T.;
A. A. Newbery of Spokane Falls, W. T.

Eighth.

The principal place of business of this corporation shall be the city of Spokane Falls, Spokane county, Washington Territory.

In testimony whereof we have hereunto subscribed our names and affixed our seals to these articles of incorporation this 14th day of April, A. D. 1888. (In triplicate.)

JAMES N. GLOVER. [SEAL.]
FRANK R. MOORE. [SEAL.]
A. A. NEWBERY. [SEAL.]

In presence of—
J. M. KINNARD.
A. B. IRWIN.

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

Be it remembered that on this 14th day of April, A. D. 1888, before the undersigned, a notary public in and for the
77 county and Territory aforesaid, personally appearing came James N. Glover, Frank R. Moore, A. A. Newbery, to me personally known to be the same persons mentioned and who executed the foregoing articles of incorporation, and they severally acknowledged to me that they had so executed the same freely and voluntarily and for the purposes and uses therein expressed.

In testimony whereof I have hereunto subscribed my name and

affixed my official seal the day and year first written in this certificate.

[SEAL.] J. M. KINNARD,
Notary Public in and for Washington Territory."

And defendant then read in evidence a certified copy of the same articles of incorporation certified to by the secretary of state, filed in the office of the secretary of state on the 17th day of April, 1888, which was admitted in evidence and marked "Defendant's Exhibit 2," and the same read as follows, to wit:

"UNITED STATES OF AMERICA, }
State of Washington. }

"OFFICE OF THE SECRETARY OF STATE.

"I, Allen Weir, secretary of the State of Washington, do hereby certify that I have carefully compared the annexed copy of the articles of incorporation of the Spokane Falls and Northern Railway Company with the original now on file and of record in this office, and find the same to be a true and perfect copy thereof.

"In testimony whereof I have hereunto set my hand and affixed the seal of the State of Washington. Done at Olympia this 19th day of April, in the year of our Lord one thousand eight hundred and ninety-two.

"[SEAL.] ALLEN WEIR,
"*Secretary of State.*"

Articles of Incorporation.

"Know all men by these presents that we, the undersigned, have this day associated ourselves together for the purpose of
78 forming, and we do by these presents form and agree to become an incorporation under and by virtue of the laws of the Territory of Washington, and to that end we do hereby certify:

"First.

"That the name of the corporation shall be 'The Spokane Falls and Northern Railway Company.'

"Second.

"The objects for which the corporation is formed are:

"1. To build, equip, run, operate and maintain a railway from the city of Spokane Falls, Spokane county, Washington Territory, to some point on the Columbia river, in Stevens county, Washington Territory, also to build, equip, run, operate and maintain branch railways and extensions of said railway from any point on said railway to such other points or places in the Territories of Washington, Idaho and Montana as shall be determined from time to time by the trustees of said corporation.

"2. To construct, maintain and operate upon the line of said railway or branches, telegraph and telephone lines or to contract

with telegraph or telephone companies for the construction, maintenance and operation of such telegraph and telephone lines.

"Third.

"To build, equip and operate steamboats upon the Columbia river and such other navigable streams or lakes in the Territories of Washington and Idaho and in British Columbia, as shall be determined from time to time by the trustees of said corporation or *the* contract with any other corporation or with private individuals for the purchase, construction or operation of steamboats as aforesaid.

"Fourth.

"To borrow money for the purposes of said corporation on bonds, notes, bills, acceptances or otherwise at such rate of interest and upon such terms as the trustees of the said corporation shall deem best for the interest of said corporation and to secure the payment of same by mortgage or mortgages upon the property of said corporation, including its franchise, or any part thereof, or by such other security or securities as the said board of trustees may determine.

79 "Fifth.

"The amount of the capital stock of this corporation shall be two million five hundred thousand dollars ($2,500,000), divided into twenty-five thousand (25,000) shares, of the par value of one hundred dollars ($100) each.

"Sixth.

"The term of existence of this corporation shall be fifty (50) years from and after the date of its incorporation.

"Seventh.

"That the number of trustees who shall manage the concerns of this corporation shall be thirteen (13), and the names of those who shall so manage the concerns of said corporation from the date of its incorporation until the 16th day of July, A. D. 1888, are:

"A. F. Jefferson, of Hudson, Wisconsin.
"James Monaghan, " Spokane Falls, W. T.
"C. B. King, " " " "
"James N. Glover, " " " "
"Frank R. Moore, " " " "
"W. H. Taylor, " " " "
"B. C. Van Houten, " " " "
"J. Z. Moore, " " " "
"D. C. Corbin, " New York.
"F. J. Brickell, " Spokane Falls, "
"Warren Hussey, " " " "
"J. J. Browne, " " " "
"A. A. Newberry, " " " "

"Eighth.

"The principal place of business of this corporation shall be the city of Spokane Falls, Spokane county, Washington Territory.

"In testimony whereof, we have hereunto subscribed our name and affixed our seals to these articles of incorporation this 14th day of April, 1888. (In triplicate.)

"FRANK R. MOORE. [SEAL.]
"JAMES L. GLOVER. [SEAL.]
"A. A. NEWBERY. [SEAL.]

"In the presence of—
"J. M. KINNARD.
"A. B. IRWIN.

80 "TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

"Be it remembered that on this 14th day of April, A. D. 1888, before the undersigned, a notary public in and for the county and Territory aforesaid, personally appearing, came James N. Glover, Frank R. Moore, A. A. Newbery, to me personally known to be the same persons mentioned and who executed the foregoing articles of incorporation, and they severally acknowledged to me that they had so executed the same freely and voluntarily, and for the purposes and uses therein expressed.

"In testimony whereof, I have hereunto subscribed my name and fixed my official seal the day and year first written in this certificate.

"[NOTARIAL SEAL.] J. M. KINNARD,
"*Notary Public in and for Washington Territory.*

"(Endorsed:) Articles of incorporation of the Spokane Falls and Northern Railway Company. Filed in the office of the secretary of Washington Territory, April 17th, 1888. Recorded April 17th, 1888. Book One, page 152. N. H. Owings, secretary."

And the defendant then read in evidence a copy of the articles of incorporation and proofs of organization certified to by the Commissioner of the General Land Office showing that the articles of incorporation and proofs of organization of the defendant railroad company was filed in the office of the Secretary of the Interior on the fifth day of June, 1888, and the same was marked "Defendant's Exhibit 3," and reads in the words following, to wit:

"(4–207*a*.) C. J. R. W. C. E.

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *May* —, 1890.

"I, William N. Stone, acting Commissioner of the General Land Office, do hereby certify that the annexed copy of articles of incorporation and due proofs of organization of the Spokane Falls
81 and Northern Railway Co. under act March 3, 1875, and —— 5th, 1888, and approved by the Hon. 1st Ass't Secretary of the

Interior, June 5th, 1888, is a true and literal examplification from the original of said papers now on file in this office.

"In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington, on the day and year above written.

"W. M. STONE,
"*Acting as Commissioner of General Land Office.*

(9206-1 M.)

"I, Thomas E. Jefferson, secretary of the Spokane Falls and Northern Railway Co. do hereby certify that the organization of said company has been completed; that the company is fully authorized to proceed with the construction of the road according to the existing laws of the Territory of Washington, and that the articles of incorporation of the company filed in the Department of the Interior, *is* a true and correct copy of the same.

"In witness whereof, I have hereunto subscribed my name and affixed the corporate seal of the company.

"[SEAL.] THOMAS E. JEFFERSON, *Secretary.*

"TERRITORY OF WASHINGTON, }
County of Spokane, } *ss:*

"Arthur A. Newbery being first duly sworn, deposes and says, that he is president of the Spokane Falls and Northern Railway Co. and that the following is a true list of the officers of said company with full name and official designation of each.

"Arthur A. Newbery, president; William H. Taylor, vice-president; Thomas E. Jefferson, secretary; James N. Glover, treasurer; F. E. Hebershan, chief engineer.

"A. A. NEWBERY, *President.*

"Subscribed and sworn to before me the 7th day of May, A. D. 1888.

"[SEAL.] W. S. NORMAN,
"*Notary Public.*

"UNITED STATES OF AMERICA, }
Territory of Washington. }

"OFFICE OF THE TERRITORIAL SECRETARY,
"OLYMPIA, *April 17th,* 1888.

"I, N. H. Ownings, of Washington Territory, do hereby certify that articles of incorporation of the Spokane Falls and Northern Railway Company, *was*, on the 17th day of April, 1888, filed for record, and on the 17th day of April, 1888, *was* recorded in Book 1, page 152.

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"Witness my hand and the great seal of the Territory, at Olympia, this 17th day of April, A. D. 1888.

"[SEAL.] N. H. OWNINGS,
"*Secretary of Washington Territory.*"

"UNITED STATES OF AMERICA, }
Territory of Washington. }

"OFFICE OF THE SECRETARY.

"I, N. H. Ownings, secretary of the Territory of Washington, and custodian of the great seal, do hereby certify that I have carefully compared the annexed copy of writing, articles of incorporation of the Spokane Falls and Northern Railway Company, with the original, now on file and of record in my office, on page 152 of Book One, and that the same is a correct transcript therefrom and of the whole of said original.

"In testimony whereof I have hereunto set my hand and affixed the great seal of said Territory at Olympia, this 17th day of April, 1888.

"N. H. OWNINGS,
"[SEAL.] *Secretary of Washington Territory.*"

"*Articles of Incorporation.*

"Know all men by these presents, that we, the undersigned, have this day associated ourselves together for the purpose of forming, and we do by these presents form, and agree to become an incorporation, under and by virtue of the laws of the Territory of Washington, and to that end we do hereby certify—

"First.

"That the name of the corporation shall be the Spokane Falls and Northern Railway Company.

"Second.

"The objects for which this corporation is formed are: First—to build, equip, run, operate and maintain a railway from the
83 city of Spokane Falls, Spokane county, Washington Territory, to some point on the Columbia, in Stevens county, Washington Territory; also to build, equip, run, operate and maintain branch railways and extensions of said railway from any point on said railway to such other points or places in the Territory of Washington, Idaho and Montana as shall be determined from time to time by the trustees of said corporation. Second—to construct, maintain and operate upon the line of said railway or branches telegraph and telephone lines, or to contract with telegraph or telephone companies for the construction, maintenance and operation of such telegraph and telephone lines.

"Third.

"To build, equip and operate steamboats upon the Columbia river and such other navigable streams or lakes in the Territories of Washington and Idaho, and in British Columbia as shall be determined from time to time by the trustees of said corporation, or to contract with any other corporation or with private individuals for the purchase, construction or operation of steamboats as aforesaid.

"Fourth.

"To borrow money for the purpose of said corporation on bonds, notes, bills, acceptances, or otherwise, at such rate of interest and upon such terms as the trustees of said corporation shall deem best for the interest of said corporation, and to secure the payment of same by mortgage or mortgages upon the property of said corporation, including its franchise or upon any part thereof, or by such other security or securities as the said board of trustees may determine.

"Fifth.

"The amount of capital stock of this corporation shall be two million five hundred thousand dollars ($2,500,000), divided into twenty-five thousand (25,000) shares of the par value of one hundred dollars ($100) each.

"Sixth.

"The term of existence of this corporation shall be fifty (50) years from and after the date of its incorporation.

84 "Seventh.

"That the number of the trustees who shall manage the concerns of this corporation shall be thirteen (13), and the names of those who shall so manage the concerns of said corporation from the date of its incorporation until the 16th day of July, A. D. 1888, are:

"A. F. Jefferson of Hudson, Wis.
"James Monaghan of Spokane Falls, W. T.
"C. B. King of Spokane Falls, W. T.
"James N. Glover of Spokane Falls, W. T.
"Frank R. Moore of Spokane Falls, W. T.
"W. H. Taylor of Spokane Falls, W. T.
"R. B. Van Houten of Spokane Falls, W. T.
"J. Z. Moore of Spokane Falls, W. T.
"D. C. Corbin of New York.
"F. J. Brickell of Spokane Falls, W. T.
"Warren Hussey of Spokane Falls, W. T.
"J. J. Browne of Spokane Falls, W. T.
"A. A. Newbery of Spokane Falls, W. T.

"Eighth.

"The principal place of business of this corporation shall — the city of Spokane Falls, Spokane county, Washington Territory.

"In testimony whereof we have hereunto subscribed our names and affixed our seal to these articles of incorporation this 14th day of April, A. D. 1888. (In triplicate.)

"JAMES N. GLOVER. [SEAL.]
"FRANK R. MOORE. [SEAL.]
"A. A. NEWBERY. [SEAL.]

"In the presence of—
"J. M. KINNARD.
"A. B. IRWIN."

"TERRITORY OF WASHINGTON, }
County of Spokane, } *ss*:

"Be it remembered that on this 14th day of April, A. D. 1888, before the undersigned, a notary public in and for the county and Territory aforesaid, personally appearing, came James N. Glover, Frank R. Moore, A. A. Newbery, to me personally known to
85 be the same persons mentioned, and who executed the foregoing articles of incorporation, and they severally acknowledged to me that they had so executed the same freely and voluntarily, and for the purposes and uses therein expressed.

"In testimony whereof I have hereunto subscribed my name and affixed my official seal the day and year first written in this certificate.

"[SEAL.] "J. M. KINNARD,
Notary Public in and for Wash. T'y.

"(Endorsed:) Filed in the office of the secretary of Washington Territory, April 17th, 1888. Recorded April 17th, 1888. Book '1,' page 152. N. H. Ownings, secretary. Copy of the articles of incorporation of the Spokane Falls and Northern Railway Co.

"UNITED STATES OF AMERICA, }
Territory of Washington. }

"OFFICE OF THE SECRETARY.

"I, N. H. Ownings, secretary of the Territory of Washington and custodian of the great seal, do hereby certify that I have carefully compared the annexed copy of writing, *i. e.*, sections 1 and 2 of an act to provide for the formation of corporations, approved Dec. 7th, 1881, with the original now on file in my office and that the same is a correct transcript therefrom and of the whole of said original.

"In testimony whereof I have hereunto set my hand and affixed the great seal of said Territory at Olympia, this twenty-fourth day of May, 1888.

"[SEAL.] N. H. OWNINGS,
"*Secretary of Washington T'y.*

"*Code of Washington,* 1881.

"An act to provide for the formation of corporations.

"CHAPTER 1.

"General incorporations.

"SECTION 1. Be it enacted by the Legislative Assembly of the Territory of Washington, That corporations for manufacturing, mining, milling, wharfing and docking, mechanical, mercan-
86 tile, building and farming purposes, or for the building, equip--ing and managing water flumes, for the transportation of wood and lumber, or for the purpose of building and running rail-

roads or engaging in any other species of trade or business, may be formed according to the provisions of this act; such corporations and the members thereof being subject to all the conditions and liabilities therein imposed and to none others.

"SECTION 2. Any two or more persons who may desire to form a company for any one or more of the purposes specified in the preceding section, shall make and subscribe written articles of incorporation in triplicate, and acknowledge the same before any officer authorized to take the acknowledgments of deeds, and file one of such articles in the office of the secretary of the Territory, and another in the office of the county auditor of the county in which the principal place of business of the company is intended to be located, and retain the third in the possession of the corporation. Said articles shall state the corporate name of the company, the object for which the same shall be formed, the amount of its capital stock, the time of its existence, not to exceed fifty years, the number of shares of which the capital stock shall consist, the number of trustees and their names, who shall manage the concerns of the company for such length of time (not less than two or more than six months) as may be designated in such certificate, and the name of the city, town or locality and country in which the principal place of business of the Co. is to be located. Amendments may be made to the articles of incorporation by supplemental articles executed and filed the same as the original articles.

"SECTION —. This act shall take effect and be enforced from and after its passage.

"Passed the council Dec. 3, 1881.

"H. F. STRATTON,
"*President of Council.*

"Passed the house of representatives Dec. 5th, 1881.

"GEORGE COMEGYS,
"*Speaker of the House.*

"Approved 7 Dec., 1881.

"WILLIAM A. NEWELL, *Governor.*

"UNITED STATES OF AMERICA, }
Territory of Washington. }

"OFFICE OF THE SECRETARY.

"I, N. H. Ownings, secretary of the Territory of Washing-
87 ton and custodian of the great seal, do hereby certify that I have carefully compared the annexed copy of writing, *i. e.*, sec. 1 of an act to amend sections 2421, 2430 and 2434 of chapter CLXXXV of the Code of Washington T'y, relating to corporations, approved Feb. 3, 1886, with the original now on file in my office, and that the same is a correct transcript therefrom and of the whole of said original.

"In testimony whereof I have hereunto set my hand and affixed the great seal of said Territory, at Olympia, this 24th day of May, 1888.

"[SEAL.] N. H. OWNINGS,
"*Sec. of Washington T'y.*

"An act to amend sections 2421, 2430 and 2434 of chapter CLXXXV of the Code of Washington Territory relating to corporations.

"Be it enacted by the Legislative Assembly of the Territory of Washington:

"SECTION 1. That sections 2421, 2430 and 2434 of chapter CLXXXV of the Code of Washington Territory relating to corporations be and the same are hereby amended to read as follows, to wit:

"Section 2421 is amended to read as follows: Corporations for manufacturing, mining, milling, wharfing and docking, mechanical, banking, mercantile improvement and building purposes, or for the building, equipping and managing water flumes for the transportation of wood and lumber, or for the purpose of building, equipping and running railroads or constructing canals, or engaging in any other species of trade or business, may be formed according to the provisions of this chapter, such corporations and members thereof being subject to all the conditions and liabilities herein imposed, and to none others; provided, that no such corporation shall commence business or institute proceedings to condemn land for corporate purposes until the whole amount of its capital stock has been subscribed.

"SECTION 4. This act to take effect and be in force from and after its passage and approval by the governor.

88 "Passed the house of representatives January 29th, 1886.

"R. O. DUNBAR,
"*Speaker of the House.*

"Passed the council February 1, 1886.

"B. B. DAY,
"*President of Council.*

"Approved February 3, 1886.

"WATSON C. SQUIRE, *Governor.*"

F. J. ROBERTS, a witness for the defendant, being called and duly sworn, testified on behalf of defendant as follows:

I reside at Spokane Falls and am a civil engineer; have been engaged in that occupation 12 years. I was the chief engineer of the Spokane Falls and Northern Railway Company during its construction in the year 1889. The map handed to me is the map of the first 20 miles of the Spokane and Northern which was prepared to send to the Interior Department to be ratified. The line of the defendant's road is marked out on this map, and it correctly shows the lines of the railroad as it was constructed. The line was finally located some time between the 8th and 15th of March, 1889, over the land in controversy. This map is a copy of the map or profile prepared to be filed in the Land Office with the Secretary of the Interior. It is a triplicate of the map that was filed.

And thereupon the map and certificate of the register certifying it to be a true copy of the map filed in the Land Office here on December —, 1889, and approved by the Secretary of the Interior on December 14th, 1889, was placed and read in evidence and marked

respectively Exhibits 4 and 5, and said map and certificates are as follows, to wit:

(Here follows map marked p. 88*a*.)

The witness then continuing testified as follows: I had charge of the construction of the road over the ground in controversy. It was constructed over this land immediately after it was located in March, 1889. This map now handed to me is the map showing the location of the line across sections nine (9), four (4) and three (3) in the same township that this land in controversy is situated in. The map correctly shows the line of that road as it runs across the ground in controversy.

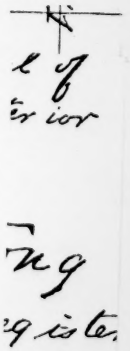
89 And here the map was introduced in evidence as "Defendant's Exhibit," marked "6," and is as follows:

(Here follows map marked p. 89*a*.)

The tract of land in controversy is marked on the map. The length of the road as it crosses that land is 1,655 feet; the width occupied by the right of way is 25 feet on each side of the center line. Borrowing pits were dug on the right of way for a distance of 300 feet; the balance of the road was constructed by earth hauled from cuts on the adjoining land. The pits only extended from 300 feet in length; the balance of the way is simply a fill of earth from land further to the north and south of this land in controversy. The borrow pits would average about 2½ feet in depth. The road starts in on this land with a fill of about a foot and a half, and in 300 feet it runs up to 2½ feet, and then for 500 feet more it lessens to about a foot and the balance of the way to a fill of less than a foot. My knowledge of the fill is from the record book and from observation made since the construction of the road. The paper handed to me is a profile on the natural scale of the land across that piece of ground showing the fills at each station; the red line indicates the grade of the railroad, the black line the natural-ground line. Each square marked on this map represents a hundred feet, and the smaller squares 20 feet; the smallest squares represent two feet. The scale of the map is the same both ways, in height as well as in length. The profile correctly represents the surface ground over which the road is constructed, and the elevation of the road above it as it is constructed over the ground.

The profile and map were then introduced in evidence as "Exhibit 7," and the same are as follows, to wit:

The grade of the road over this land is a one per cent. grade—one foot in a hundred; it is an upgrade as it goes from the city, and the grade is continuous across the tract. The depression in the ground occasioned the necessity for the fill across this land; the grade would occasion very little impediment to the construction of roads or streets across the railroad on this land. In the majority



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The grade of the road over this land is a one per cent. grade—one foot in a hundred; it is an upgrade as it goes from the city, and the grade is continuous across the tract. The depression in the ground occasioned the necessity for the fill across this land; the grade would occasion very little impediment to the construction of roads or streets across the railroad on this land. In the majority

of cases, if there had been no railroad there and the streets were graded on an even grade, such grade would come up to about the grade of the railroad. The natural slope of this ground is from the northwest to the southeast; the lowest ground is on the southeast. There is one hundred feet of this fill that is three feet and half of the center; the balance of it is between that height and one foot. I think the grade of the streets crossing the rail-
90 road at the point of crossing would be very near the height of the fill of the railroad if the streets were upon an even grade, even if the railroad was not there. The ground is higher to the north, and in a majority of cases the elevation of the railroad would be the same as at a point one hundred feet north of the railroad. The view of persons living north of this railroad is not obstructed by the railroad grade because the ground is higher than the grade at the railroad, and it would not obstruct the view if the ground was level. The railroad does not back the water up upon the ground; there are culverts to let it through. The character of the soil is gravel, and surface water does not stand upon it. I have never known the water to run over it. The average height of this fill across the land is a little less than two feet; there were not exceeding six hundred yards of gravel taken from the borrow pits to make this grade on the land; it would cost about $75 to fill up these borrow pits. In grading the streets across this railroad at the highest point of the fill, if the ground was perfectly level, the grade of the street would be three and a half feet in fifty feet, or a seven per cent. grade. The ground rises to the north of the road. The average of the grade of streets crossing the railroad would be a four per cent. grade, and we have steeper grades on Riverside avenue than that. I am acquainted with this tract of land in controversy. I do not remember that there were any improvements on this land in 1889, when this road was built across it, except the fence; there was an old cabin there. I do not know whether it was on this ground or not; there was nothing growing inside of this fence. I do not remember now whether there was an orchard there or not; if there had been any fruit trees I think I would have seen them. I do not remember whether any fences were taken down in constructing the road or not. There was a wire fence there; I do not know whether this was the one or not.

Cross-examination.

By Mr. GRAVES:

The top of the railroad track is at the right height for grading streets across it if you carry the street from one natural point to another. The railroad was made to fit in there. It would cost the railroad less than $75 to fill up the borrow pits on that land. We could get the dirt on Webster's place; and any one could fill up these borrow pits for $75, if they could go on Webster's place,
91 take up the gravel, haul it on the cars, and scatter it on the borrow pit. I estimated the amount of gravel taken from the borrow pits and I know how many feet have been taken out.

There were three hundred feet in the embankment, I mean 300 feet in length, about 600 cubic yards in the fill, which came out of the borrow pits. The railroads runs through this land for 1,655 feet. For a 2-feet fill it takes 17 feet wide and the fill is all the way from nothing to 3½ feet high. I did not say there were only 600 cubic feet of dirt in the entire fill, what I did say is that there are 600 yards of dirt where it has been borrowed and the balance was hauled there.

Redirect examination.

By Mr. ALLEN:

In borrowing earth for the purpose of making this grade we did not go beyond 25 feet of the center line of the railroad.

E. J. WEBSTER, being called and duly sworn on behalf of the defendant, testified as follows:

Examined by Mr. ALLEN:

I reside in Spokane and have resided here 10 years in April. I used to do quite a bit of buying and selling real estate for myself and others, and for several years. Of course I bought and sold when I could, and all the time I have been here I have had more or less experience since I have been in the city, and I am reasonably well acquainted with the value of real estate in the city, and I was reasonably well acquainted with the value of lands on the north side of the river adjoining the town or adjacent to the town, in the month of May, 1889, at the time of the building of the Spokane Falls and Northern railway, because I happened to make sales of adjoining land to the land in controversy. Own lands, three quarter sections, adjoining this tract on the 480 acres and I own some nearer town. Mine joins with his, and the addition I laid out adjoins him on the south. In the spring of 1888, just before it was known that the Spokane Falls and Northern railway was to be built, the land in controversy was not worth a $100 an acre. I have just bought it in the spring before for $40 adjoining, immediately before the construction of this railroad and immediately before it was known that the road was going to be built. That spring $100 an acre would be very high for it. After this road was constructed all land went up 100 per cent.; I sold before and after. It was worth double right
92 afterwards during the excitement before the rails were laid, it was worth 100 per cent. more. I have been over this land a great many times and I know how the railroad is constructed across it; it adjoins my land; the market value of this land just before the road was built was not to exceed 100 dollars per acre, and before it was known the road was going to be built; after it was built this land was worth $200 an acre, and there is no question about it. Of course all land is affected more or less for residence purposes by railroads crossing it; but this land has, as shown by the engineer, a gentle slope from the north to the south, and one

per cent. grade up the hill. If there was a gentle slope to the east and west it would be about perfect; it drops on the west and rises back to the east. If you would fill that now, just as the engineer stated, it would be on a grade; it would take just the angle of the road exactly; it is not higher on the west end than it is on the east end; it could not cross the property in better shape than it does. If the railroad was not there at all, in grading streets across it the grade would be about the natural way the streets ought to be; on the north and south streets it would be a little different; it don't reach in places more than 50 feet north before you strike the ground all the way along.

Cross-examination.

By Mr. GRAVES:

I have no particular business now; I used to practice law here a few years; I had been in real estate more or less; I used to be a lawyer: I have no retainer in this case. Just before it was known that this road was to be built this land was not worth $100 an acre; I bought land there for $40 an acre before; I think it was known early in the spring that this road was to be built, in the third or fourth month of the year; it was known in the spring of 1889; I think perhaps as early as January or February; it was known that the road was to be built, and then 90 days after it was known that the road was to be built I think the real estate doubled in value, and all owing to the building of this railroad. After it was known that the Seattle, Lake Shore and Eastern was to be built, lots and property went up 200 and 300 per cent. The Seattle road, I believe, was built in 1889 or 1890, or along there somewhere; I do not remember the exact time the Seattle was built; $300 an acre.

Witness excused.

93 C. R. BURNS, being called and duly sworn on behalf of the defendant, testified as follows:

Examined by Mr. ALLEN:

I reside in Spokane; had resided here since 1887; I think I knew something of the value of real estate, the market values, in the city of Spokane in the year 1889. I know the land in controversy, known as the Ziegler tract. I have known that land pretty nearly ever since I lived in Spokane, and I was acquainted with the value of real estate in that locality in the spring of 1889. The market value of this piece of ground during the spring of 1889 and immediately before the construction of the road and immediately before the fact was known that the Spokane Falls and Northern railroad was going to be built, I should say, was $100 to $150 an acre; I know how the road was constructed across this land, and I know about the fill and about the borrow pits that were there.

Q. I will ask you now to state to the jury how much less, if anything, this tract of land was worth that spring after the road had

been constructed over it and with the road upon it as it is now constructed than it was worth that spring before the road was constructed, and before it was known that the road was going to be constructed over it?

This question was objected to by counsel for the plaintiff, and thereupon the court stated: I shall hold the measure of damages to be the actual market value of so much land as was taken by this right of way at the time it was taken, and also any injurious effect to the remaining portion of Mr. Zeigler's land caused by the manner in which the road was built which injuriously affected the remaining portion of the land; as, for instance, the additional expense of building fences on both sides of the road if any injury by embankments, and having a bad effect on the land as to its drainage and the necessity of passing over it. These are the nature of the special injuries the jury can take into account and allow for and in addition to that claim that is made by plaintiff for damages in consequence of the effect of this road being located where it is on the market value of what remains. Now, that probably will lead to a comparison of the market value of the land immediately before it was taken, and the market value of it was affected by the location and building of the road across it. In determining the market value that element of damage I do not see how it is possible to make the distinction between the general benefit of having
94 the railroad and the special benefit, if there was any, to the particular piece of land by having the road there. I think the jury has got to take the fact as to what the market value was at the time this land was taken and allow the plaintiff for it, irrespective of whether it was then enhanced by the boom that had occurred in the market in consequence of any anticipated benefits from the building of this road. Now, applying these ideas to the question, the question that is put here calls for a comparison of values at a time anterior to the taking of the land for the road, and I think it is improper. It is improper because it is indefinite, and does not fix the true criterion; it calls for a comparison of values between the time it was known by the public that the road was to be built. I allowed Mr. Allen to make inquiries of this kind from the plaintiff's witness because that was on cross-examination and to test the accuracy of their statements, but I do not think it is open for the defense to bring their witnesses and introduce testimony as to these facts. I think they have got to be confined to the role and offer testimony bearing on the question as to whether the building of the road across this land and the taking of this land for the road did or did not affect the market value of the land; and if it did it was injurious or beneficial and to what extent.

And thereupon the court sustained the objection to the question propounded to the witness, and the defendant by its counsel excepted to the ruling of the court.

Q. Mr. Burns, how long before the commencement of the construction of this road over the ground in controversy was it that it

became publicly known in the city of Spokane that this road was going to be built?

This was objected to by counsel for the plaintiff on the ground that it is immaterial and irrelevant, which objection was sustained and the question ruled out and the defendant excepted to the ruling of the court, and the witness, continuing, testified as follows: "I should say that the market value of this land per acre at the time of the building of this railroad over it, irrespective of any increased value by reason of the proposed construction of the railroad was about $150 an acre. Immediately after the railroad was completed over it the next day after the land was taken for railroad purposes, the land did not increase in value any or decrease in value any, but a month afterwards—not a day afterwards—I should say it increased in value.

95 This tract of land of the plaintiff's was increased in value by the construction of the road. I think all the land in that section of the country was enhanced in value, and this particular 80 acres was worth more after the building of the road than it was before; and this 40 through which the railroad runs was not worth any less after the building of the road than it was before. Part of this land adjacent to the land would not be as valuable for residence purposes with the road as without it. It could be used for other purposes which would be more valuable by the road being constructed there than it would be otherwise. This decreased value for residence purposes, I should say, would extend half a block—about 150 feet from the road. I should say that this 150 feet beyond the 25 feet on each side of the road for the purpose of residence would be depreciated 50 per cent. This same 150 feet next to the railroad would be valuable for warehouse purposes, elevating purposes, and a railroad would not hurt it any for stores for 150 feet."

Cross-examination.

By Mr. GRAVES:

I am a railroad contractor. I had a contract for the construction of this railroad. I was considerably interested in the work. I had been in the railroad business a good while. That is my principal business. This land has increased in value considerably from the time work was commenced on the road up to the 14th of May. The work was commenced in April. The road was graded over this piece of ground in the fore part of April, 1889. I think this land was worth about $150 an acre on the last day of April, 1889, and it was worth $150 right after the grading. There had not been any particular increase or decrease, as I understand it, in the value of the land. In making that statement I am leaving out what the railroad took—that was worth $150 an acre also—and am leaving out the damage that was done for a block, as I testified to. I testified that it was damaged for half a block for residence purposes. I mean that it was all worth $150 an acre. A railroad that runs diagonally through a 40 like this hurts the lots right along

the line for residence purposes—for other purposes it benefits it. Leaving out residence purposes, the building of this road makes the land fronting on the railroad more valuable than that that does not front on the railroad. I think that the building of that railroad does not decrease the value of the property any—not a particle—for the reason that it can be used for so many pur-
96 poses with a road that it cannot be used for without it. Some of those purposes are warehouse purposes. It will not be many more years before warehouses will reach out there to that point. Possibly warehouse property does not grow as fast as residence property. There is just about as many miles of warehouse property between Division street and this ground as there is residence property—about three miles. There is about three miles of warehouse property between the depot and this ground; a double row three miles long from Division street. That is one of the purposes for which this land has been benefited by this road. It is benefited for other purposes—milling purposes, machine shops, iron foundries. This property is about 1½ miles away from the river out on the dry gravel. You can run steam mills out there. I did not calculate that this property, three miles on each side of the tract along the Spokane and Northern, is going to be used for the purpose of putting up steam mills; I said it could be used for that. This railroad has also furnished facilities for travels through the land.

Redirect examination:

I have no contract with the Spokane Falls and Northern railroad at this time; my former contract is completed. I have no interest whatever in the result of this action. I think I have a little bit of stock in the company. There is about a mile and a half or two miles of vacant ground suitable for residence property between this ground in controversy and the city of Spokane. The ground beyond the premises in controversy is vacant; out four miles it is vacant. It is as suitable for residence as this ground. This ground in controversy will be needed for warehouse and mill purposes about as soon as it will be needed for residence property.

Witness excused.

FRANK C. LORING, being called and sworn on behalf of defendant, testified as follows:

Examined by Mr. ALLEN:

I reside at present in Spokane; my occupation is that of civil engineer and mining engineer. I have been engaged in that occupation since 1880. The ground in controversy has been pointed out to me. I examined it for the purpose of ascertaining
97 the height of the grade over it. I have had experience in laying out railroads, ordinary wagon roads, streets and highways, and I examined this ground with a view of ascertaining the height of this grade as it runs across this ground. I began at a

point on the southwest where the railroad enters the land as it was pointed out to me. At that point the fill is perhaps less than two feet or about two feet. It continues a maximum fill of about four feet and decreases again to less than one foot to the northeast. For the last northeastern 500 feet the fill is about one foot. I would say that the average height of this fill across this land would be about two feet and a half. I should judge this railroad is built upon about a one per cent. grade across this land, and it is built upon a uniform grade. The railroad runs on a straight line where it passes through this land. There is a depression in the ground there, and in order to make the grade uniform from the southwest to the northeast it became necessary to make this fill. If the streets were laid off on this ground they would not vary two feet from it if they were put on a uniform grade. If the streets were properly graded over this land there would not be two feet difference between the grade of the streets and the grade of the railroad. There would be in the neighborhood of a foot perhaps.

Cross-examination:

I did not say that I think that this railroad is put through this land so that the surface just fits in nicely to the grades of the streets it crosses through. I say, if the streets were of a uniform grade, they would be within a foot of the railroad. I am of the opinion, from my examination of the surface of the road, that the surface of the road and the surface of the country to the north and to the south nearly conform; in other words, the point were the grade leaves the surface is a point which is naturally a hill, and for that reason the grade is on the surface there, and a uniform grade on the north and south from that, all would be about the same distance on the surface. That hill is about 4 or 500 feet wide in going north and south. The railroad took an average topography of the county. I should imagine this hill runs about the middle of that hill. I should imagine the road runs about 250 feet before it strikes the level; it would not strike the level before there is a gentle slope of the entire tract of land from the north to the south, and if
98 you start straight on a level with this surface at the level of this railroad track, it would never get to the level; it would be above the surface all the way until it struck the other side of the Spokane river.

Redirect examination:

That would be if we were grading on a level. If you graded straight to conform to the average topography of the country you would nearly or quite strike the railroad grade, as I said before, because that conformed to about the average grade of the slope from the north to the south. I examined the borrow pits on this ground; they extended along the side of this track about 300 feet—perhaps 310 feet. The total length of this road through the track is about 1,650 feet. Those borrow pits are near the middle of the

tract of land. I estimated that in the two borrow pits there was between five and six hundred cubic yards taken out. They average probably two feet deep from the level of the surface and extended back 25 feet at the farthest point. The balance of the 1,650 feet over this tract of land there are no borrow pits whatever.

Witness excused.

A. A. NEWBERY, being called and sworn as a witness for and on behalf of the defendant, testified as follows:

I reside at Spokane; have resided there nine years; a very large portion of that time I had been engaged in buying and selling real estate in Spokane and vicinity; I know the property in controversy, the east half of the southeast quarter of section 4; I have known it in particular since the construction of the Spokane Falls and Northern road; in general I have known it since I have been here. I know the value of land in that vicinity at the time of the construction of the Spokane Falls and Northern railroad; judging by sales of property near there, I should say the value of this land immediately before the construction of this road over it, irrespective of any increased value thereof by reason of the proposed building of the road, would be about $100 an acre. I think that would be a fair value, and I should think that immediately after the construction of the road, in the manner in which it was constructed, it was worth about $150 an acre.

Cross-examination:

The question Mr. Allen asked me was the value of that land irrespective of any increased value by the building of the road.
99 I said it was worth $100 an acre. I mean that it was worth $8,000 before the road was built and $12,000 afterward—provided you did not know the road was going to be built. This land was worth $150 an acre the day the road was built over it. It was worth the same amount after the road was built over it. It might have damaged this property some along the right of way for residence property, but it did not damage it in the market value at all. The land right up against these borrow pits would sell for just as much as if the borrow pits and the railroad were not there for certain purposes. They would sell for just as much with the property cut diagonally across in that way as if the road had not been there. It did not hurt it a bit. The idea is this: The tract is there, and the ground having a railroad here can be used for other purposes, and consequently is salable, and the borrow pits cut no figure. I am for the mill theory—the same theory we talked over in the other cases, five or six of us, of which I am one. We have been swearing to this ever since the commencement of this railroad, and we are still speaking about it. I am now cashier for the Citizens' bank; before that my business was real estate. I have been the land agent here for the Northern Pacific; I am vice-president of this road; I hold that position still; I have been mixed up with almost all the rail-

roads that are here except the Seattle; the Seattle is the only one I escaped. I have been instrumental in getting railroads into this town. I do not get a salary under the office I now hold. The salary is a small one.

Witness excused.

F. J. WEBSTER being called as a witness on behalf of the defendant testified as follows:

I do not know as I know the value of this particular land adjacent to the railroad for warehouse purposes or milling purposes. It ought to be worth just as much as that beyond. Just a mile and a half away they have organized a big pressed brick establishment. Their capitalization is $200,000. They have taken two blocks of good land adjacent to the railroad for that purpose. They are trying to get a certain amount to put into a plant and they will put up so much money. I should think it is desirable to have that kind of a plant on a railroad or they would not have it on a railroad.

100 Cross-examination:

That is not in Minnehaha. I would be very glad to sell the land in Minnehaha for brick and warehouse purposes. I am not getting a cent for those lots. I am a convert to business, and the railroads cannot live without warehouses. I have never been called upon to swear to this warehouse theory before. If I had been I certainly would.

Witness excused.

W. H. TAYLOR, being called and sworn, testified on behalf of defendant as follows:

Examined by Mr. ALLEN:

I reside in Spokane and have resided there since the fall of 1883. I have been acquainted with the values of land in the city during that time. I have been engaged part of the time in buying and selling real estate, and have owned real estate in the city. I know the land in controversy claimed by Mr. Zeigler—the east half of the southeast quarter of section 4. I have bought land near it—within half a mile of it—land very similarly situated to this. I was acquainted with the values of land in that locality in the spring of 1889.

Q. Now, Mr. Taylor, what was the value of this 80-acre tract, owned by Mr. Ziegler, in the spring of 1889, just before it was known that the Spokane Falls and Northern railway was going to be built?

Question objected to by counsel for the plaintiff as incompetent, immaterial and irrelevant, which objection was sustained and excepted to by the defendant and exception allowed.

—. At the time that land was taken by the railroad I think the fair market value of the tract of land per acre will be $150.

Q. If that had been put into the hands of a skillful real-estate dealer for sale at that time, could he have sold it for any more than that?

Question objected to by counsel for the plaintiff as incompetent. Objection sustained and defendant excepts. Exception allowed by the court.

—. I should say that the value of this tract of land per acre immediately after the railroad was built upon it, taken into consideration any useful purposes for which the land was suitable or could have been made with the railroad upon it, would be $150 per acre. There was an enhancement in values in land shortly after the construction of the railroad.

101 Cross-examination:

I was interested in this road at one time; I think I had 28 or 29 shares of stock; I was a director. I have not been a witness for the company along with the balance of the officers, stockholders and directors of this company in all of these right-of-way cases around here. I have not been a witness in a good many of the places. I have not been a witness in all the right-of-way cases I have heard of.

Redirect examination:

I have not been a witness in more than one case for this railroad Co.

Witness excused.

And here the defendant rested *his* case.

Bill of Exceptions to Instructions of the Court.

Be it remembered that on the trial of this cause at the close of the evidence and before the argument the defendant requested the court to give to the jury the following instruction, viz:

"It appearing from uncontroverted proof in this case that at the time the defendant filed its articles of incorporation and proofs of its organization with the Interior Department on the fifth day of June, 1888, that the plaintiff was a pre-emption claimant to the land in controversy, and didn't pay for said land until after that date, nor until after the construction of said road over the premises, he is not entitled to a verdict for any amount, and the jury are instructed to return a verdict for the defendant."

Which instruction the court refused to give. To which ruling and refusal the defendant excepts.

And be it further remembered that after the argument of the cause to the jury the court of its own motion instructed the jury as follows:

GENTLEMEN OF THE JURY: The questions involved in this case are two: The first question is as to the plaintiff's title to the land

and his right to receive damages. And the second question is as to the amount of damages he is entitled to, if he is entitled to anything.

On the undisputed facts in the case the first question resolved itself into a question of law purely. There has not been shown
102 on the trial, any disputed question of fact, which the jury are called upon to decide, and the court decides upon the undisputed facts in the case that Mr. Ziegler, the plaintiff, has shown that he is the owner of the property; that he was the owner of the property at the time it was taken, and entitled to compensation for any portion of it taken by the defendant, and the defendant has failed entirely to prove the claim it sets up in its answer to be the owner of a strip of land for right-of-way purposes by a title paramount to that which Mr. Ziegler had at the time the road was built, so that you will award to the plaintiff some damages, whatever sum under the rules which the court will lay down; you find under the evidence, the plaintiff to be entitled to.

As I have said, the court holds the plaintiff to be the owner of the land, but I do not wish to be understood by that saying that he was then the owner in fee; that he had a title in fee or other rights than such as belonged to a settler under the pre-emption law of the United States, which give him a possessory right and a vested interest in the property, so that no part of it could be lawfully taken from him without compensation being paid for it, and in determining the amount of damages to be awarded to him you will take the circumstances into consideration of the condition in which the title was at the time the road was built and award him the value of the property as you find it to be considering the title to be involved as it was by reason of the matter being undetermined in the Land Department as to his right to it and there being a contest and that he was being obstructed in obtaining his patent to it by reason of a dispute as to its right. Now, taking that into account, you will award him such amount of damages as will compensate him for so much of the land as the railroad Co. have appropriated for the right of way and for whatever injurious effect the road may have caused to the land which he owned, the balance of the 80-acre tract described in his complaint. The amount of the land taken for the right of way is shown to be by the undisputed testimony in the case 1 acre and $\frac{8}{10}$ of an acre, and the plaintiff will be entitled at least to the full market value of that amount of land, irrespective of any effect upon the market value by reason of the building of the road. You will figure the value on 1 and $\frac{8}{10}$ acres as you will find it to be—as you will calculate the value to be, and that value is to be taken at such market value not effected by the building of the road—the market value just as it would be if the road was not to be built.

103 Then you will further consider whether the building of this road injuriously affected the portion of the land that is left to the plaintiff outside of the right of way. Consider in connection with that all the facts testified to and which you find shown by the testimony in the case as to the manner in which the land is subdivided—the shape it is left in, and the additional cost, if any-

thing for enclosing it by a fence. The fact of the embankment thrown up for the road-bed as obstructing passage over it, or the drainage of the property, building of roads and streets, and any effect it may have on the property, considering the property for any use it might be put to.

And if you determine from the testimony that any of this land or all of it is injuriously affected by the road, you will also award the plaintiff compensation for that injury, and fix the amount of damages for that injury upon the basis of the valuation of the property, the market value, and the market value will be determined the same as in determining the amount to be awarded as compensation for the land taken for the right of way—that is, the market value at the time the land was taken and the road built, irrespective of any effect either beneficial or otherwise, upon the market value of the property attributable to the railroad. The market value of the property will be the criterion, and you will determine the amount to award to the plaintiff upon the whole case by this rule. You will give him the difference between the market value of the property as a whole and the market value of what is left outside of the right of way, and determine the market value just the same as it would be if the road was not to be built. As to all the affirmative allegations of the plaintiff as to the injury to the property and the manner in which it is affected, the burden of proof is upon him, and you are to determine according to the preponderance of the evidence. The burden of proof is upon him, therefore he must take out his case by a fair preponderance of his testimony. There must be testimony enough to weigh down all the testimony that you find in the case on the side of the defense contradicting his claims, and weigh the testimony by the rules that men of experience apply in determining any question of fact where they are acting fairly and candidly and as you would in a matter of like importance to yourselves.

Harmonize the testimony of the different witnesses as far as it can be, and where there is a conflict in the testimony of the
104 different witnesses weigh one against the other the same way you would in determining a like question of your own affairs, and determined by a preponderance of testimony. Expert testimony—that is, the opinions of men having peculiar advantages of their experience or by their occupation to form an opinion or an estimate, is to be taken as being of importance and value in making an estimate, and the jury are not to be concluded by the testimony of experts in determining what the market value of the property is. You must, in view of all the facts, weigh any testimony as to the location, condition and quality of the land and the uses to which it is adapted, as well as the opinion of real-estate men and others having qualifications to speak as to its value, and conclude what the value is according to your own best judgment, and when you fix that value apply it to the case and determine what amount of damages plaintiff is entitled to.

He is in any event, to have the full market value for the land they have taken for the right of way, and if the land that is left to him is injured at all, then he is entitled in addition to that, to have

the difference between the value of the whole tract, and the value of what is left of it, taking the value as it was when the road was built and the market value irrespective of the effect on the market value by reason of the building of the road.

After the oral charge of the court as above, the court said to the jury: "To make the instruction of the court more explicit, I will read to you some instructions in writing which are presented to me, and which are correct;" and after which the court read to the jury the following instructions submitted in writing, and asked by the defendant:

And be it further remembered: that the court at the request of the defendant gave to the jury the following instructions:

The jury are instructed that where a part of the tract is taken as in this case, the owner is entitled to recover not simply the market value of what is taken, but the difference between the market value of the entire tract and the market value of the part which is left.

The jury are further instructed that in estimating the value of the land, they are to be governed entirely by the evidence as to the market value at the time the land was taken by the defendant irrespective of any increased value thereof, by reason of the proposed construction of the R. R.

The jury are further instructed that in estimating the value
105 of the property taken by the defendant, it is the market value of the property which is to be considered. The market value of property is the price which it would have brought when offered for sale by one who desires, but is not obliged to sell it and is bought by one who is under no necessity of having it. The jury are further instructed that the basis for the estimation of the damages is the value of the land as it would be at the time of the appropriation, if the road was not to be built. The measure of the damages would be the difference in amount between the value of the tract as a whole, not including therein the increased value, if any, occasioned by the construction of the proposed road, and the value of the land left, and not including therein the increased value resulting from the building of the road.

And be it further remembered: that no other instructions were given by the court to the jury.

And be it further remembered: that upon the giving of said instructions the defendant excepted to the following portions of the instructions given by the court of its own motion and upon the following grounds, to wit: the defendant excepted to that part of the instructions of the court, in words as follows:

"And the plaintiff will be entitled at least to the full market value of that amount of land." Occurring in said charge after the words "The amount of land taken for the right of way is shown to be by undisputed testimony in the case one acre and $\frac{8}{10}$ of an acre." This exception being taken upon the ground that there a part of a tract of land is taken, the compensation to be paid is the difference in the value of the tract as a whole before taking, and the value of

a tract with the railroad constructed upon it, and appropriating the strip for the right of way.

The defendant further excepts to that portion of the charge of the court in words as follows:

"And you will determine the amount to award the plaintiff upon the whole case by this rule; you will give him the difference between the market value of the property as a whole and the market value of what is left outside of the right of way," occurring in said charge after the following words, "The market value of the property will be criterion." This exception being upon the ground that when taken in connection with the previous instructions the
106 jury were required to give the plaintiff the value of the strip of land twice.

Defendant also excepts to the following portion of the charge of the court, being the last paragraph in the instructions given by the court before reading the instructions asked by the defendant, to wit:

"He is in any event to have the full value of the land they have taken for the right of way, and if the land that is left to him is injured at all then he is entitled in addition to that to have the difference between the whole tract and the value of what is left of it, taking the value as it was when the road was built and the market value irrespective of the effect on the market value by reason of the building of the road." This exception being upon the ground that it required the jury to estimate the value of the strip taken twice. And for the further reason that said portion of said charge is inconsistent with the law as laid down by the court in the instructions given at the request of the defendant; and for the further reason that it permitted the jury in estimating the injury to the land not taken to consider the value of the land at the time of the taking, whereas the instruction should have been that they were only to consider the value of the land as it was immediately before the taking and without any increased value thereto by reason of the proposed construction of the road.

Whereupon at the request of the defendant this, its bill of exceptions to the charge of the court, is hereby allowed and ordered to be made a record in this case.

By the court.

C. H. HANFORD, *Judge.*

Be it further remembered that thereupon the said cause was submitted to the jury and the jury thereafter and on the — day of —— returned into court and rendered the following verdict and special finding:

"We, the jury in the case of William H. Ziegler, plaintiff, *vs.* The Spokane Falls and Northern Railroad Company, defendant, find for the plaintiff and assess the damages at the sum of seventy-five hundred dollars ($7,500).

C. W. IDE, *Foreman.*"

107 "We, the jury in the case of William H. Ziegler, plaintiff, against The Spokane Falls and Northern Railroad Company, defendant, find especially that the defendant has appropriated for its right of way a strip of land twenty-five feet in width on each side of the center of its track extending across the plaintiff's land described in the complaint, and no more, and that the area of the plaintiff's land so appropriated is 1 and $\frac{8}{10}$ths acres, and no more; and the amount of damages awarded by our general verdict is computed upon the basis of the land appropriated for said right of way being a strip fifty feet in width and containing 1 and $\frac{8}{10}$ths acres.

"C. W. IDE, *Foreman.*"

Wherefore, to the end that the errors in law, if any, committed by the court on the trial of this cause may appear, I certify that the foregoing bill of exceptions contains all the evidence on the trial, and all the instructions given to the jury; and the said bill of exceptions is hereby settled, allowed, signed, and sealed and made a record in the cause.

C. H. HANFORD, *Judge.*

Dated this 1st day of September, 1892.

Endorsed: Received a copy of within notice and proposed bill of exceptions this 25th day of June 1892. Turner, Graves & McKinstry, attorneys for plaintiff.

In the U. S. circuit court, district of Washington. William H. Ziegler, plaintiff, *vs.* The Spokane Falls and Northern Railway Company, defendant. Proposed bill of exceptions and notice. Filed June 25th, 1892, in the U. S. circuit court. A. Reeves Ayers, clerk, by A. H. Kenyon, deputy.

And afterwards, to wit: on the 16th day of July, 1892, there *was* duly filed in said court, in said cause, objections, in the words and figures as follows, to wit:

108 In the Circuit Court of the United States of America, Ninth Circuit, in and for the District of Washington, Eastern Division Thereof.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

Plaintiff objects to the settlement of the proposed bill of exceptions heretofore filed and served in the above-entitled cause for the reasons:

First. That the exceptions to the reception or rejection of testimony are scattered through a large mass of testimony which is irrelevant to said exceptions, and the same are not stated or saved in such a manner as to make them intelligible without great and

unnecessary labor and trouble, and the exceptions saved and reserved by the plaintiff are therein stated as well as those saved and reserved by the defendant, and that said proposed bill is unnecessarily prolix, and is not certain and perspicuous, and ought not to be signed in its present form.

Second. That the several matters of law to which plaintiff excepts are not distinctly specified in said proposed bill, and that all of the charge of the court is unnecessarily and improperly included in the bill.

Third. That in the second and third lines from the bottom of page 99 should be stricken out from the charge of the court the words "in addition to that."

Fourth. That all of the defendant's exceptions to the oral charge of the court should be stricken out except the last one on page 102, because that was the only exception taken to the said oral charge. And the grounds of said exceptions as given in said proposed bill should be stricken out and the following inserted: "This exception was taken by counsel on the retirement of the jury to consider of its verdict, and counsel stated in taking the exception that it was upon the ground that the instruction directed the jury to estimate and allow for the value of the strip taken twice. The court said to counsel that such was not the intention of the court, and that
109 it did not think the language susceptible of that construction. To which counsel for the defendant replied that such was the sense of the instruction as he gathered it, but that he thought it not of much moment as the instructions asked by him and given by the court correctly laid down the rule of damages."

Fifth. That on page 54 of the proposed bill in the 6th question on said page the following should be stricken out, to wit: "In both accounts, $500, or $600, or $700."

Sixth. That on page 59 of said proposed bill the first question thereon should be stricken out and the following inserted in its stead, to wit: "Mr. Munter, in your experience in real estate in this city, have you had experience and noticed the value of possessory titles under the land laws of the United States and under homestead and pre-emption laws?"

Seventh. That on page 83 of said proposed bill the second word in the third line from the bottom on said page should be stricken out and the word "offer" inserted in its stead.

Eighth. That on page 84 of said proposed bill the first line thereof should be stricken out and the following inserted in its stead, to wit: "the land, and if it did, whether it was injurious or beneficial."

TURNER, GRAVES & McKINSTRY,
Attorneys for Plaintiff.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Charles H. Wolf, being first duly sworn, on his oath deposes and says: That he is a citizen of the United States, over the age of 21 years, and was over said age at the time service was made as herein

set forth; that he is not the plaintiff or defendant in the above-entitled action; that he is competent to be a witness on the trial of said action; that he served the foregoing objections upon McBride & Allen upon the 16th day of July, 1892, by delivering and leaving at the office of the said parties a true and correct copy of the same.

CHARLES H. WOLF.

Subscribed and sworn to before me this 16th day of July, 1892.

——— ———,

Notary Public in and for the State of Wash.,
Residing at Spokane.

110 (Endorsement on back:) No. 83. U. S. circuit court of Spokane county, Washington. W. H. Ziegler, plaintiff, *vs.* Spokane Falls & Northern R. R., defendant. Filed July 16th, 1892, in the U. S. circuit court. A. Reeves Ayres, clerk, by A. H. Kenyon, deputy. Turner, Graves & McKinstry, att'ys for plaintiff.

And afterwards, to wit: on the 22d day of July, 1892, there was duly filed in said court in said cause defendant's dissent to proposed amendments and notice of forwarding bill of exceptions to judge in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Washington, Eastern Division.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendants.

To Messrs. Turner, Graves & McKinstry, att'ys for plaintiff in the above-entitled action:

You are hereby notified that the defendant in the above-entitled — dissents to each and all of the proposed objections and amendments made by you to the bill of exceptions proposed by the defendant in said cause, excepting the objection or amendment number "5th," and to this objection or amendment defendant assents.

You are further notified that on Sat., the 23d day of July, 1892, at 10 o'clock a. m., the undersigned will direct the clerk of the above court to transmit to the Hon. C. H. Hanford, judge of the above court, at Tacoma, Wash., the proposed bill of exceptions together with your proposed objections and amendments for the purpose of having the same settled.

Yours, etc.,

McBRIDE & ALLEN,
Att'ys for Defendant.

111 (Endorsement on back:) In the United States circuit court, district of Washington, eastern division. William H. Ziegler, plaintiff, *vs.* The Spokane Falls and Northern Railway Co., defendant. Defendant's dissent to proposed amendments and notice of forwarding bill of exceptions to judge. Filed July 22d, 1892,

in the United States circuit court. A. Reeves Ayres, clerk, by A. H. Kenyon, deputy. McBride & Allen, attorneys for defendant. Due service of a copy of the within admitted this 22nd day of July, 1892.

And afterwards, to wit, on the 29th day of July, 1892, there was duly filed in said court in said cause a memorandum on settlement of exceptions, in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Washington, Eastern Division.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

Defendant's Memoranda on Settlement of Exceptions.

All the exceptions to instructions included in the proposed bill, pages 95 to 103, inclusive, are an exact copy of the exceptions heretofore signed. The last three lines, however, and the signature of the judge on page 103 should be stricken out, as it came in by accident in copying the former exceptions into this proposed general bill of exceptions.

In answer to the matters urged in the first and second objections of plaintiff, we suggest that it has not been the practice to group the exceptions to the reception or rejection of evidence in the bill of exceptions—the object sought by plaintiff's objections will be accomplished by the assignment of errors, which will accompany the writ of error.

In answer to the third objection or proposed amendment, we suggest that the words "in addition to that," were in the charge
112 of the court. as written out by both stenographers, and is in the exceptions as signed by the court, a copy of which was furnished to counsel for plaintiff, and they were present at the time it was signed.

In answer to the fourth amendment proposed by plaintiff we desire to state that as we recollect the proceedings on the trial we called the court's attention to the point that as we understood the charge it allowed double value and asked any exception. The court did not think it open to that objection. We could not well at that time point out the erroneous parts from the stenographer's notes, and it was understood it should be afterwards written out, which was done, and the exception signed.

We assent to the fifth and sixth and seventh and eighth proposed amendments.

We enclose herewith what we conceive to be the form of certificate of settlement and allowance of bill of exceptions, which, if proper in form, we request to be attached to the bill. We have put into it a certificate that the bill contains all of the evidence and all

of the instructions given, as we desire that it should appear on the face of the record the fact that it does not contain all of the instructions and evidence, which is the fact.

We enclose you herewith for reference the testimony in the case as taken and written out by our stenographer, which please return with the papers to the clerk for us.

Respectfully submitted.

McBRIDE & ALLEN,
Attorneys for Defendant.

(Endorsement on back:) Circuit court of the United States, district of Washington, eastern division. William H. Ziegler, plaintiff, *vs.* The Spokane Falls and Northern Railway Co., defendant. Defendant's memoranda on settlement of exceptions. Filed July 29th, 1892, in the United States circuit court. A. Reeves Ayres, clerk, by A. H. Kenyon, deputy. McBride & Allen, attorneys for defendant.

And afterwards, to wit, on the 7th day of October, 1892, there was duly filed in said court in said cause a bond in the words and figures as follows, to wit:

113 Know all men by these presents: that we, the Spokane Falls and Northern Railway Co., a corporation, as principal, and E. B. Hyde and A. A. Newbery, as sureties, are held and firmly bound unto William H. Ziegler in the full and just sum of fifteen thousand two hundred and fifty dollars ($15,250) to be paid to the said William H. Ziegler, his certain attorneys, executors, administrators or assigns to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 6th day of October in the year of our Lord one thousand eight hundred and ninety-two.

Whereas, lately in the circuit court of the United States for the district of Washington, eastern division, in a suit pending in said court between William H. Ziegler, plaintiff, and The Spokane Falls and Northern Railway Co., a corporation, defendant, on the 29th day of April, A. D. 1892, a judgment was rendered against the said Spokane Falls and Northern Railway Co. for the sum of seven thousand five hundred dollars ($7,500) damages and one hundred and twenty-one dollars and forty cents ($121.40) costs of suit, and the said Spokane Falls and Northern Railway Co., having obtained from said court its writ of error to reverse the said judgment in the aforesaid suit, and the citation directed to the said above-named plaintiff citing and admonishing him to appear in the United States circuit court of appeals for the ninth circuit to be holden at San Francisco, in the State of California, on the — day of —— next.

Now the condition of the obligation is such that if the said Spokane Falls and Northern Railway Co., plaintiff in error shall prosecute its said writ to effect and answer all damages and costs if it

fail to make its plea good, then the above obligation to be void; else to remain in full force and effect.

SPOKANE FALLS AND NORTHERN
RAILWAY CO., [SEAL.]
By D. C. CORBIN, *President.* [SEAL.]
By ALBERT ALLEN, *Ass't Sec.* [SEAL.]
F. B. HYDE, [SEAL.]
A. A. NEWBERY. [SEAL.]

Acknowledged before me the day and year first above written.
[SEAL.] E. J. BOWMAN,
Notary Public, Residing at Spokane.

114 STATE OF WASHINGTON, } ss:
County of Spokane, }

F. B. Hyde and A. A. Newbery, being first duly sworn each for himself deposes and says: That he is a householder in the State of Washington and is worth the sum of fifteen thousand two hundred and fifty dollars, exclusive of property exempt from execution over and above all debts and liabilities.

F. B. HYDE,
A. A. NEWBERY.

Subscribed and sworn to before me this 6th day of Oct., A. D. 1892.
[SEAL.] E. J. BOWMAN,
Notary Public, Residing at Spokane.

(Endorsement on back:) No. —. In the United States circuit court, ninth judicial circuit, in and for the district of Washington, eastern division. Wm. H. Ziegler, plaintiff, *vs.* The Spokane Falls and Northern Railway Co., defendant. Supercedeas bond on writ of error. The within bond, as to form, amount and sufficiency of sureties, is hereby approved. C. H. Hanford, U. S. district judge, presiding in the circuit court. Filed Oct. 7th, 1892. A. Reeves Ayres, clerk U. S. circuit court.

And afterwards, to wit: on the 7th day of Oct., 1892, there was duly filed in said court in said cause and assignment of errors, in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the District of Washington, Eastern Division.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

Assignment of Errors.

Now comes the defendant in the above-entitled action, and upon the records and proceedings in this case, assigns the following errors:

115 First. The court erred in allowing the plaintiff, William H. Ziegler, to testify as to the date when he first entered upon the land in controversy, for the purpose of entering under the pre-emption laws.

Second. The court erred in permitting the plaintiff to testify as to the time of making final proof upon the land.

Third. The court erred in permitting the plaintiff to testify to making a tender to the officers of the Land Office of the purchase price of the land.

Fourth. The court erred in admitting in evidence plaintiff's Exhibit "B," being a patent from the Government of the U. S. to the plaintiff for the land in controversy.

Fifth. The court erred in refusing to allow the witness, C. R. Burns, a witness for the defendant, to answer the following question:

I will ask you now to state to the jury how much less, if anything, this tract of land was worth that spring after the road had been constructed over it, and with the road upon it as it is now constructed, than it was worth that spring before the road was constructed, and before it was known that the road was going to be constructed, over it?

Sixth. The court erred in refusing to allow the defendant to prove the value of the land as it was just before the road was constructed over it, and before it was known that the road was going to be constructed, and the value of the land with the road upon it, immediately after the road was constructed?

Said ruling and decision of the court being as follows, to wit:

"I shall hold the measure of damages to be the actual market value of so much land as was taken by this right of way at the time it was taken, and also any injurious effect to the remaining portion of Mr. Ziegler's land caused by the manner in which the road was built, which injuriously affected the remaining portion of the land; as, for instance, the additional expense of building fences on both sides of the road, if any; injury by embankments, and having a bad effect on the land as to its drainage, and the necessity of passing over it. These are the nature of the special injuries the jury can take into account and allow for, and in addition to that the claim that is made by the plaintiff for damages in consequence of the effect of this road being located where it is, on the market value of

what remains. Now, that will probably lead to a comparison
116 of the market value of the land immediately before it was taken, and the market value of it as it was affected by the location of the building of the road across it. In determining the market value, that element of damage I do not see how it is possible to make the distinction between the general benefit of having the railroad, and the special benefit, if there was any to the particular piece of land, by having the road there. I think the jury has got to take the fact as to what the market value was at the time this land was taken, and allow the plaintiff for it, irrespective of whether it was then enhanced by the boom that had occurred in the market in consequence of any anticipated benefits from the building of this road. Now, applying these ideas to the question, the question that is put here calls for a comparison of values at a time anterior to the taking of the land for the road, and I think it is improper. It is improper because it is indefinite, and does not fix the true criterion; it calls for a comparison of values between the time it was known by the public that the road was to be built. I allowed Mr. Allen to make inquiries of this kind from the plaintiff's witness because that was in cross-examination and to test the accuracy of their statements, but I do not think it is open for the defense to bring their witnesses and introduce testimony as to these facts. I think they have got to be confined to the rule, and offer testimony bearing on the question as to whether the building of the road across this land and the taking of this land, for the road did or did not affect the market value of the land; and if it did, whether it was injurious or beneficial, and to what extent."

Seventh. The court erred in refusing to allow C. R. Burns, a witness for the defendant, to answer the following questions, propounded to him by the defendant's counsel:

"Q. How long before the commencement of the construction of this road over the ground in controversy was it that it became publicly known in the city of Spokane that this road was going to be built?"

Eighth. The court erred in refusing to allow Mr. W. H. Taylor, a witness on the part of the defendant, to answer the following question:

"Q. Now, Mr. Taylor, what was the value of this 80-acre tract, owned by Mr. Ziegler, in the spring of 1889, just before it was known that the Spokane Falls and Northern railway was going to be built?"

Ninth. The court erred in refusing to allow said witness
117 Taylor to answer the following question, propounded by counsel for the defendant:

"Q. If that land had been put into the hands of a skillful real-estate dealer for sale at that time, could it have been sold for any more than that?"

Tenth. The court erred in refusing to give the following instruction, requested by the defendant:

"It appearing from uncontroverted proof in this case that, at the time the defendant filed its articles of incorporation and proofs of

its organization with the Interior Department on the 5th day of June, 1888, that the plaintiff was a pre-emption claimant to the land in controversy, and didn't pay for said land until after that date, nor until after the construction of said road over the premises, he is not entitled to a verdict for any amount, and the jury are instructed to return a verdict for the defendant."

Eleventh. The court erred in giving to the jury the following portion of instructions given by the court of its own motion, to wit:

"And the plaintiff will be entitled at least to the full market value of that amount of land," occurring in the charge of the court after the words, "the amount of land taken for the right of way is shown to be by the undisputed testimony in the case one acre and $\frac{8}{10}$ths of an acre."

Twelfth. The court erred in giving to the jury that portion of the charge of the court, in words as follows:

"And you will determine the amount to award the plaintiff upon the whole case by this rule: You will give him the difference between the market value of the property as a whole and the market value of what is left outside of the right of way," said portion occurring in said charge after the following words: "The market value of the property will be the criterion."

Thirteenth. The court erred in giving to the jury that portion of the instructions given by the court in words as follows:

"He is in any event to have the full value of the land they have taken for the right of way, and if the land that is left to him is injured at all, then he is entitled, in addition to that, to have the difference between the whole tract and the value of what is left of it, taking the value as it was when the road was built and the market value, irrespective of the effect on the market value by reason of the building of the road."

118 Wherefore, the defendant, The Spokane Falls and Northern Railway Co., prays that the judgment of the said circuit court of the U. S. for the district of Washington, eastern division, in the above-entitled cause, be reversed.

McBRIDE & ALLEN,
Att'ys for Defendant, Plaintiff in Error, Room 311,
Hyde Block, Spokane, Washington.

Endorsement on back: In the circuit court of the U. S., ninth jud. circuit, district of Washington, eastern division. William H. Ziegler, plaintiff, *vs.* The Spokane Falls & Northern Railway Co., defendant. Assignment of errors. Filed Oct. 7th, 1892. A Reeves Ayres, clerk. McBride & Allen, att'ys for defendant.

And afterwards, to wit, on the 7th day of October, 1892, there was duly filed in said court in said cause a petition for writ of error in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the District of Washington, Eastern Division.

WILLIAM H. ZIEGLER, Plaintiff,
vs.
THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Defendant.

Petition for Writ of Error.

Above-named defendant, The Spokane Falls & Northern Railway Co., conceiving itself aggrieved by the decision and judgment of this court entered on the 29th day of April, 1892, in the above-entitled action, doth pray for a writ of error from said decision and judgment to the United States circuit court of appeals in and for the ninth judicial circuit of the United States, and prays that a writ of error may be allowed, and that a transcript and record of the proceedings upon which said judgment was rendered duly authenticated may be sent to said court of appeals.

McBRIDE & ALLEN,
Att'ys for Appellant.

119 And now, to wit: on this 7th day of Oct., A. D. 1892, it is ordered that the foregoing petition be allowed, as prayed for.

C. H. HANFORD,
U. S. District Judge, Presiding in said Circuit Court.

(Endorsed:) Filed Oct. 7th, 1892. A. Reeves Ayres, clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the U. S., ninth circuit, in and for the district of Washington, eastern division, Greeting:

Because in the record and proceeding, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between William Ziegler, plaintiff, and The Spokane Falls and Northern Railway Company, defendant, a manifest error hath happened, to the great damage of the said Spokane Falls and Northern Railway Company, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, at San Francisco, California, together with this writ, so that you have the same at the said place within thirty days from the date hereof in said court, to be there and then held, that the record and proceedings aforesaid be- inspected, the said circuit court of appeals may cause further to

be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 7th day of October, in the year of our Lord one thousand eight hundred and ninety-two and of the Independence of the United States the one hundred*th* and sixteenth.

The above writ of error is hereby allowed.

[SEAL.] C. H. HANFORD,
U. S. District Judge, Presiding in the Circuit Court.

120 UNITED STATES OF AMERICA, *ss:*

To William H. Ziegler, Greeting:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the ninth circuit in the city of San Francisco, State of California, within thirty days after the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Washington, eastern division, wherein The Spokane Falls and Northern Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should — be done to the parties in that behalf.

Dated this seventh day of October, 1892.

C. H. HANFORD,
United States District Judge, Presiding in the said Circuit Court.

(Endorsed:) Citation on writ of error. Due service of the within citation by copy admitted this seventh day of October, 1892. Turner, Graves and McKinstry, attorneys for defendant in error.

UNITED STATES OF AMERICA, }
Eastern Division, District of Washington, } *ss:*

I, A. Reeves Ayres, clerk of the circuit court of the United States of America for the district of Washington in the ninth circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the *following* pages from 1 to —, inclusive, contain a true and complete transcript of the record and proceeding had in said court in the cause of William H. Ziegler, plaintiff in error, against The Spokane Falls and Northern Railway Co., defendant in error, as the same remain of record and on file in said office.

In witness whereof I have caused the seal of said court to be hereto affixed at the city of Spokane, in the eastern division, district of Washington, in the ninth circuit, this third day of November,
121 in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States the one hundred and seventeenth.

[SEAL.] A. REEVES AYRES, *Clerk,*
By A. H. KENYON, *Deputy.*

(Endorsed:) No. 81. United States circuit court of appeals for the ninth circuit. The Spokane Falls and Northern Railway Co., plaintiff in error, *vs.* William H. Ziegler. Transcript of record. Error to United States circuit court, district of Washington, eastern division. Filed November 7, 1892. F. D. Monckton, clerk.

122 In the United States Circuit Court of Appeals for the Ninth Circuit.

SPOKANE FALLS & NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
W. H. ZIEGLER, Defendant in Error. } No. 81.

Appeal from the circuit court of the United States for the district of Washington, eastern division.

Jay H. Adams and McBride & Allen for plaintiffs in error.
George Turner for defendant in error.

Before McKenna, circuit judge; Gilbert, circuit judge; Hawley, district judge.

123 By the court—McKENNA, *J.*:

This case comes on writ of error from the circuit court for the district of Washington, eastern division.

Defendant in error recovered judgment, after a verdict by jury, against plaintiff in error for damages for an appropriation of a strip of land, part of the E. ½ of S. E. ¼, sec. 4, T. 25 *N.*, R. 43 E., W. M.

The defendant in error was, on the first day of May, 1889, in possession of said land as a pre-emptor, having the legal qualifications of such, and had made final proofs and had tendered the purchase-money and demanded his final receipt.

The money was not received on account of a contest in the land office.

The plaintiff in error, defendant in the court below, is a corporation under the laws of Washington for the purpose of constructing and operating a railroad from the city of Spokane Falls in a northerly direction through the counties of Spokane and Stevens to the Columbia river. The evidence also shows that plaintiff in error filed in the office of the Secretary of the Interior a copy of the articles of incorporation, and that afterwards, in 1889, commenced the construction of its road and surveyed and marked the line of its road, which line ran over the lands of the defendant in error, and that within twelve months after locating said line filed a profile map thereof with the register of the land office of the district in which the land is situated, which map was approved by Secretary of Interior, and afterwards constructed its road; and the defendant in error therefore contends that of said acts and under the

124 act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public

lands of the United States," it became the owner of a right of way across the land of the defendant in error, and that the circuit court erred in admitting proof of Zeigler's entry of the land and tender of payment therefor and patent from the United States.

The act of Congress referred to above is as follows:

"That the right of way through the public lands of the United States is hereby granted to any railway company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proof of its organization under the same, to the extent of one hundred feet on each side of the central line of said road;

"Also the right to take from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad.

"Also ground adjacent to such right of way, for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road. * * *

"SEC. 3. That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section 3 of the act entitled, 'An act to aid in the
125 construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July 1, 1862,' approved July 2, 1864.

"SEC. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located, a profile of its road; and upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass, shall be disposed of subject to such right of way.

"Provided, that if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

"SEC. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands especially reserved from sale." * * *

The act did not operate as a present grant. Its words are "that the right of way through the public lands is hereby granted to any railroad company."

The opening words of section 4 of the Oregon donation act are

"that there shall be, and hereby is, granted to every white settler or occupant of the public land."

126 In neither act is there a grantee, and the Supreme Court said, in construing the latter act in Hill *vs.* Russell, 101 U. S., 509, "There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee." And the court further said that in all cases where a grant was given a present effect, a State or some corporation having all of the qualifications specified in the act had been designated as a grantee. In other words, when an immediate grant was intended an immediate grantee, having all the requisite qualifications, was named.

The act therefore did not give a right of way presently, but entitled any company to obtain the right of way upon performing certain conditions, and its right attached upon filing a profile map of its road, as provided in section 4.

It will be observed that the provision of section 4 is that after filing the profile of the road all lands over which the right of way shall pass shall be disposed of subject to such right of way. Lands therefore which had been disposed of theretofore were exempt.

The pre-emption laws are certainly a means of disposing of the public lands, and an entry of record under them valid on its face is such an appropriation of the tract entered as segregates it from the public domain and precludes it from subsequent grant.

Hastings, etc., Railroad Co. *vs.* Whitney, 132 U. S., 357.
Stern *vs.* Beck, 133 U. S., 541.

An express reservation is not necessary.
Wilcox *vs.* Jackson, 13 Pet., 498.

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Leavenworth, etc., R. R. Co. *vs.* U. S., 745.

That pre-emption claims are exempted from the grant is supported by section 3 of the act. It is as follows:

127 SEC. 3. That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section 3 of the act entitled, "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four.

Counsel for plaintiff in error urges that — the words "possessory claims" Congress intended only to protect the improvements of a settler. The explanation is not adequate.

See also Enoch *vs.* Spokane Falls & Northern Railway Company, decided by the supreme court of Washington, opinion filed May 24, 1893.

The cases of Railroad Co. *vs.* Baldwin, 103 U. S., 425, and Western Pacific Railroad Co. *vs.* Tevis and Kerr, 41 Cal., 489, do not

militate with the conclusions we have reached. In the former case the grant was a present one, and necessarily, as the court said, all persons acquiring any portion of the public lands after its date took subject to the grant.

In the case of Western Pacific Railroad Co. *vs.* Tevis and Kerr the plaintiff was the successor of the Central Pacific Railroad Co., who had been granted by Congress a right of way over the public lands Kerr claimed as a pre-emption, and, though he had settled on the land and had improved it, he had not filed a declaratory statement when the right of way attached.

128 The court held that he was neither the owner nor a claimant of the land within the meaning of section 3 of the act granting the right of way to the railroad, which provided a means of ascertaining damages in case the owner or claimant of the land and the railway Co. could not agree.

The facts of the case, therefore, and the one at bar are different.

The plaintiff in error claims that the circuit court erred in sustaining an objection to the following question:

"Q. How much less, if any, was this tract of land worth that spring (1889), after the road had been constructed over it and with the road upon it as it is now constructed, than it was worth that spring before the road was constructed and before it was known that the road was going to be constructed over it?"

The appropriation of the land was made on the fifth day of June, 1889, while Washington was a Territory, and the laws of the Territory then was that compensation should be made to the owner of land taken "irrespective of any increased value thereof by reason of the proposed improvement." * * *

In support of the relevancy of the question plaintiff in error cites N. P. R. Co. *vs.* Coleman, 3 Wash. Rep., 234. This case, however, was overruled in Enoch *vs.* Spokane Falls & Northern Railway Co., filed May 24, 1893.

The circuit court therefore did not err in sustaining objection to the question.

Judgment is affirmed.

(Endorsed:) No. 81. U. S. circuit court of appeals for the
129 ninth circuit. Spokane Falls & Northern R'y Co., pl'ff in error, *vs.* W. H. Ziegler. Opinion. Filed April 12, 1894. F. D. Monckton, clerk.

130 United States Circuit Court of Appeals for the Ninth Circuit.

SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Plaintiff in Error, *vs.* WILLIAM H. ZIEGLER. } No. 81.

In error to the circuit court of the United States for the — district of Washington, eastern division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Washington, eastern division, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and the cause is remanded to said circuit court for such further proceedings as may be necessary in accordance with the opinion of this court.

Endorsed: Judgment. Filed April 12, 1894. F. D. Monckton, clerk.

131 At a stated term, to wit, the October term, A. D. 1893 of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Thursday, the tenth day of May, in the year of our Lord, one thousand eight hundred and ninety-four.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Thomas P. Hawley, district judge.

SPOKANE FALLS AND NORTHERN RAILWAY CO., Plaintiff in Error, *v.* WILLIAM H. ZIEGLER. } No. 81.

Upon the application of Albert Allen, Esq., counsel for the plaintiff in error—

It is ordered that the issuance of the mandate herein to the court below be, and the same is hereby, stayed for a period of thirty days from date.

132 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Plaintiff in Error, *vs.* WILLIAM H. ZEIGLER, Defendant in Error. } No. 81.

Petition for Rehearing.

Albert Allen, attorney for plaintiff in error.

Endorsed: Filed Jun- 13, 1894. F. D. Monckton, clerk.

133 United States Circuit Court of Appeals for the Ninth Circuit.

THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
WILLIAM H. ZEIGLER, Defendant in Error.

To the honorable the judges of the United States circuit court of appeals, ninth circuit:

The plaintiff in error above named presents to your honors this, its petition for a rehearing in the above-entitled cause, and respectfully represents as follows, viz:

That since the argument of this case the act of Congress approved March 3, 1875, has been considered by the U. S. Supreme Court and some rules of construction laid down as applicable thereto, which we believe to be more favorable to your petitioner than was held by this court, and which we confidently assert would, upon reconsideration, cause this honorable court to reverse the judgment of the circuit court.

In the case of The United States *vs.* The Denver and Rio Grande R'y Co., 14 Supreme Court Rep., p. 11 (decided Oct. 23, 1893), Mr. Justice Jackson speaking for the court with reference to the act of Congress approved March 3, 1875, entitled "An act granting railroads the right of way through the public lands of the United States," at page 15 of the decision, after quoting from the
134 opinion of Mr. Justice Field in the case of R. R. Co. *vs.* Barney, 113 U. S., 618, says:

"Looking to the condition of the country and the purposes intended to be accomplished by the act this language of the court furnishes the proper rule of construction of the act of 1875. When an act, operating as a general law and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations, as inducements to undertake and accomplish great and expensive enterprises or works of a quasi-public character, in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted."

In the case of R. R. *vs.* Barney, 113 U. S., 625, Mr. Justice Field, speaking of grants to aid in the construction of railroads, says: "The acts making the grants are to receive such a construction as will carry out the intent of Congress. * * * To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together."

Congress evidently had two objects in view in passing the act, viz:

1st. To aid railroads desiring to build; and

2d. Make the act general so all could have the benefit of it and

relieve Congress of the annoyance of numerous applications for grants.

135 Section 1 of this act, in terms, grants the right of way to any company duly organized, etc., which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same. The articles generally give the general route and termini of the proposed road. The act provides that these articles shall be filed with the head of the Land Department, and this record when read in connection with the act makes as complete a grant as the one construed by the U. S. Supreme Court in Railroad Co. *vs.* Baldwin, 103 U. S., 425. And we submit that if the name of this company and the general route and termini of the road as described in the articles of incorporation had been included in this act, the court could not distinguish this act from the act in the Baldwin case. Would it do violence to the act to hold that upon the filing of the articles and proofs (which we conceive to be an acceptance of the act), the act instantly becomes a grant to that company over the route and between the termini described in the articles? We believe this would be a fair and reasonable construction of the act. Such a construction would not leave room for settlers to rush to the land office and file on the land as soon as a survey was commenced, and then compel the railroad company to pay for the land, as was done in the case of Enos against this very company, decided by the supreme court of the State of Washington, upon the strength of which the judgment in this case was in part affirmed. In the Enos case the entire road had been located, excepting a gap of about one mile, which was being surveyed at the time of the Enos filing.

136 But for the survey, he never would have filed. And yet the company was compelled to pay full value for the land because Enos could file in the land office before the company could complete its surveys and file a map.

We also submit that the words, any company desiring to secure the benefits of this act, were not intended to postpone all rights until a map should be filed.

The word secure, says Webster, means "to make safe." To put beyond hazard of not receiving or of losing. We think the word as used means to hold—to keep. Again section 4 provides that thereafter (after filing the map) the land shall be disposed of subject to the right of way."

Was this land disposed of by the mere filing of a declaratory statement? "Dispose," says Webster, is "to exercise finally one's power of control over; to alienate." Had the Government exercised finally its power of control over this land; was it alienated? It was a mere permission to buy in the future. It could have been instantly abandoned by Zeigler. The Government could have witheld it, or could have granted it to any one for any purpose, so long as the money had not been received for the land. This was not done until long after the railroad was built and map filed, and therefore the land should have been disposed of subject to the right of way.

Instead of this we were compelled to pay $7,500 for 1.8 acres of land, the title to which was still in the United States, and we were not even allowed to show that the land had been benefited by the building of the road; and, again, by the instructions of the court (13, assignment of error, Trans., p. 117) the jury were in
137 substance told that plaintiff was to have the full value of land taken for the right of way; and, in addition to that, he was to have the difference between the value of the whole tract and the value of what is left of it. This, we submit, was in effect requiring double pay for the land taken.

This last point was, through oversight, not made clear in our brief, although one of the important assignments of error.

We also submit that certified copies of the records of the land office *was* the best evidence of the entry and declaratory statement and final proof of Zeigler for the land, and that parol proof of these facts was not admissable. See first, second and third assignments of error, Trans., p. 115; testimony of W. H. Zeigler, Trans., p. 63. These assignments seem not to have been noticed in deciding the case.

We would further respectfully say that we believe that if a rehearing and reargument of this case can be had, we will be able to satisfy this court that its construction of the act of March 3, 1875, will work very great injustice, not only in this case but to all railroads seeking to build under the act and render the act almost without benefit, while a different construction, the one we contend for, would give effect to all parts of the act and make it harmonious.

We, therefore, humbly pray that a rehearing be granted herein to the end that entire justice may be done.

ALBERT ALLEN,
Attorney for Plaintiff in Error.

138 I hereby certify that, in my opinion, the points raised by the foregoing petition are good in law, and entitled to the consideration of this court; and that said petition is not filed for the purpose of delay, but in good faith.

ALBERT ALLEN,
Attorney for Plaintiff in Error.

139 In the United States Circuit Court of Appeals for the Ninth Circuit.

SPOKANE FALLS & NORTHERN RAILWAY COMPANY, Plaintiff in Error, *vs.* W. H. ZIEGLER, Defendant in Error.	No. 81.

In re petition of plaintiff in error for a rehearing.

In the opinion filed in this case we held that the right of way over public lands granted to railroads under the act of March, 1875,

did not vest at the passage of the act, but vested upon filing a profile map of the road. We said:

"The act therefore did not give a right of way presently, but entitled any company to obtain the right of way upon performing certain conditions, and its right attached upon filing a profile map of its road, as provided in section 4."

140 It is not necessary to repeat the reasoning by which we arrived at those conclusions.

Appellants have filed a petition for rehearing and cite in support thereof Noble *v.* Union River Logging R. R., 147 U. S., 165–177.

In that case Justice Brown said (to quote all that is applicable to the case at bar): "The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and when decided and his approval was noted upon the plats the first section of the act vested the right of way in the railroad company. The language of that section is 'that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory,' etc. The uniform rule of this court has been that such an act was a grant *in præsenti* of lands to be thereafter identified. Railway Company *v.* Alling, 99 U. S., 463."

It is not clear what appellant claims from this language, but, assuming it claims, as it claimed in the original briefs, that the grant took effect at the time of filing its articles of incorporation with the Secretary of the Interior, it is certainly disputable if the language of the court sustains the claim.

It must be interpreted by the facts of the case. Contending rights depending upon the time of the vesting of the right of way were not involved. The authority of the Secretary of the

141 Interior over the acts of his predecessor only was involved.

The facts as to the papers filed, as stated by the court, were as follows: "In January, 1889, the company, desiring to avail itself of an act of Congress of March 3, 1875 (18 Stat., 482), granting to railroads a right of way through the public lands of the United States, filed with the register of the land office at Seattle a copy of its articles of incorporation, a copy of the territorial law under which the company was organized, and the other documents required by the act, together with a map showing the termini of the road, its length, and its route through the public lands according to the public surveys. These papers were transmitted to the Commissioner of the Land Office and by him to the Secretary of the Interior, by whom they were approved in writing and ordered to be filed. They were accordingly filed at once and the plaintiff notified thereof."

All the documents required by the act were filed. Of course, therefore, the profile of the road, as required by section 4, was filed, and when, by approval of the Secretary of the Interior, as the court said, "the first section of the act vested the right of way in the railroad company." This is not contrary to our decision; but, if this

language of the court be construed as holding that the right of way vested upon filing the articles of incorporation, the judgment of the circuit court was, nevertheless, correct, because the pre-emption claim of appellee antedates the filing of the articles of incorporation, and the land was not then public land. The authorities jus-
142 tifying this conclusion are cited in our original opinion and need not be repeated.

Petition for rehearing denied.

(Endorsed:) Opinion. Filed Oct. 15, 1894. F. D. Monckton, clerk.

143 At a stated term, to wit, the October term, A. D. 1894, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Monday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety-four.

Present: The Honorable Joseph McKenna, circuit judge; Honorable William B. Gilbert, circuit judge; Honorable Thomas P. Hawley, district judge.

THE SPOKANE FALLS AND NORTHERN RAILWAY CO., Plaintiff in Error,
vs.
W. H. ZIEGLER. } No. 81.

The petition of the plaintiff in error for a rehearing herein having been duly considered and the opinion of the court having been filed, it is ordered that said petition be, and the same is hereby, denied.

144 *Assignment of Errors.*

Upon the record and proceedings in this case the plaintiff assigns the following errors:

First. The court erred in deciding and holding that under the act of Congress approved March 3rd, 1875, entitled "An act granting to railroads a right of way through the public lands of the United States," the right of way of the railroad company did not attach until the filing of a profile map of its road.

Second. The court erred in not holding that the said act of Congress approved March 3rd, 1875, was a grant to all railroad companies to construct roads over the public lands which should file with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, as provided in section 1 of said act, and that upon filing such copy of articles of incorporation and due proofs of organization the said act of Congress, together with the articles filed, immediately becomes as to such railroad company a private grant to the company of a right of way, etc., as of that date, viz., June 5th, 1888.

Third. The court erred in not holding that the grant to the rail-

road company of its right of way attached and became a private grant to that company of date June 5th, 1888, granting a right of way through all lands public at that date between the termini of the road shown by its articles of incorporation, and that upon surveying its line of route and filing map or profile of the definite location of the road the rights of the railroad company related
145 back to the date of filing its articles of incorporation and proofs of organization.

Fourth. The court erred in holding and deciding that the words "possessory claims" used in said act of Congress were intended to protect more than the improvements of a settler, which decision, as applied to the facts of this case, was in effect holding and deciding that the settler was entitled to pay for the land as though he was the owner in fee, while the fee was in the Government and subject to be withheld or granted away, and was in fact granted to the railroad company on June 8th, 1888.

Fifth. The court erred in holding and deciding that an entry of record under the pre-emption laws valid on its face (which in this case was a mere filing of a declaratory statement) is such an appropriation of the tract as segregates it from the public domain and precludes it from subsequent grant, and in deciding that an express reservation of such claims is not necessary.

Sixth. The court erred in sustaining the ruling of the circuit court in allowing the plaintiff in the circuit court to testify as to the date when he first entered upon the land in controversy for the purpose of entering under the pre-emption laws.

Eighth. The court erred in sustaining the ruling of the circuit court in permitting the plaintiff Zeigler to testify as to time of making final proof upon the land.

Ninth. The court erred in sustaining the ruling of the circuit court in permitting the plaintiff Zeigler to testify to making
146 a tender to the officers of the land office of the purchase price of the lands.

Tenth. The court erred in sustaining the ruling of the circuit court in admitting in evidence the Plaintiff's Exhibit "B," being a patent from the Government of the United States to the plaintiff for the land in controversy.

Eleventh. The court erred in sustaining the ruling of the circuit court in refusing to allow the defendant to prove the value of the land as it was just before the road was built over it and before it was known that the road was going to be constructed and the value of the land immediately after the road was constructed.

Twelfth. The court erred in sustaining the ruling of the circuit court in refusing to give the following instruction to the jury, requested by the defendant:

"It appearing from the uncontroverted proof in this case that — the time the defendant filed its articles of incorporation and proofs of its organization with the Interior Department, on the 5th day of June, 1888, that the plaintiff was a pre-emption claimant to the land in controversy and did not pay for said land until after that date nor until after the construction of said road over the premises

he is not entitled to a verdict for any amount, and the jury are instructed to return a verdict for the defendant."

Thirteenth. The court erred in sustaining the action of the circuit court in giving to the jury that portion of the instructions of the court in words as follows:

"He is in any event to have full value of the land they have taken for the right of way, and if the land that is left to him
147 is injured in any way, then he is entitled in addition to that to have the difference between the whole tract and the value of what is left of it, taking the value as it was when the road was built and the market value, irrespective of the effect on the market value by reason of the building of the road."

Fourteenth. The court erred in affirming the judgment of the circuit court and in not reversing the judgment of the circuit court.

Wherefore the plaintiff in error, The Spokane Falls & Northern Railway Company, prays that the decision and judgment of the said circuit court of appeals for the ninth judicial circuit, as well as the judgment of said circuit court for the district of Washington, eastern division, in this cause be reversed.

JOHN R. McBRIDE &
ALBERT ALLEN,
Counsel for The Spokane Falls & Northern Railway Company, Plaintiff in Error.

(Endorsed:) No. 81. U. S. circuit court of appeals, ninth circuit. The Spokane Falls & Northern Railway Company, pl'ff in error, *vs.* William H. Zeigler, def't in error. Assignment of errors. Filed Oct. 30, 1894. F. D. Monckton, clerk.

148 In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

THE SPOKANE FALLS & NORTHERN RAILWAY COMPANY, Plaintiff in Error, *vs.* WILLIAM H. ZEIGLER, Defendant in Error.	Petition for Writ of Error.

To the honorable the Supreme Court of the United States of America:

Now comes The Spokane Falls & Northern Railway Company, plaintiff in error in the above-entitled cause, considering itself aggrieved by the decision and judgment of said circuit court of appeals made and entered on the 12th day of April, A. D. 1894, in said action, and doth attach hereto its assignment of errors as a part hereof, and prays that a writ of error may issue from your honorable court to said circuit court of appeals to review said judgment and decision, and that the proper citation be issued to the defendant therein, and that a proper bond be accepted to stay proceedings in said action.

JOHN R. McBRIDE &
ALBERT ALLEN,
Counsel for Petitioner.

149 *Assignment of Errors.*

Upon the record and proceedings in this case the plaintiff assigns the following errors:

First. The court erred in deciding and holding that under the act of Congress approved March 3rd, 1875, entitled "An act granting to railroads a right of way through the public lands of the United States," the right of way of the railway company did not attach until the filing of a profile map of its road.

Second. The court erred in not holding that the said act of Congress approved March 3rd, 1875, was a grant to all railroad companies to construct roads over the public lands which should file with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same as provided in section 1 of said act, and that upon filing such copy of articles of incorporation and due proofs of organization the said act of Congress, together with the articles filed, immediately becomes as to such railroad company a private grant to the company of a right of way, etc., as of that date, viz., June 5th, 1888.

Third. The court erred in not holding that the grant to the railroad company of its right of way attached and became a private grant to that company, of date June 5th, 1888, granting a right of way through all lands public at that date between the termini of the road shown by its articles of incorporation, and that upon surveying its line of route and filing map or profile of the definite location of the road the rights of the railroad company related back to the date of filing its articles of incorporation and proofs of organization.

150

Fourth. The court erred in holding and deciding that the words "possessory claims" used in said act of Congress were intended to protect more than the improvements of a settler, which decision as applied to the facts of this case was in effect holding and deciding that the settler was entitled to pay for the land as though he was the owner in fee, while the fee was in the Government and subject to be withheld or granted away and was in fact granted to the railroad company on June 8th, 1888.

Fifth. The court erred in holding and deciding that an entry of record under the pre-emption laws valid on its face (which in this case was a mere filing of a declaratory statement) is such an appropriation of the tract as segregates it from the public domain and precludes it from subsequent grant, and in deciding that an express reservation of such claims is not necessary.

Sixth. The court erred in sustaining the ruling of the circuit court in allowing the plaintiff, in the circuit court, to testify as to the date when he first entered upon the land in controversy for the purpose of entering under the pre-emption laws.

Eighth. The court erred in sustaining the ruling of the circuit court in permitting the plaintiff Zeigler to testify as to time of making final proof upon the land.

151 Ninth. The court erred in sustaining the ruling of the circuit court in permitting the plaintiff Zeigler to testify to making a tender to the officers of the land office of the purchase price of the lands.

Tenth. The court erred in sustaining the ruling of the circuit court in admitting in evidence the Plaintiff's Exhibit "B," being a patent from the Government of the United States to the plaintiff for the land in controversy.

Eleventh. The court erred in sustaining the ruling of the circuit court in refusing to allow the defendant to prove the value of the land as it was just before the road was built over it and before it was known that the road was going to be constructed and the value of the land immediately after the road was constructed.

Twelfth. The court erred in sustaining the ruling of the circuit court in refusing to give the following instruction to the jury, requested by the defendant:

"It appearing from the uncontroverted proof in this case that at the time the defendant filed its articles of incorporation and proofs of its organization with the Interior Department, on the 5th day of June, 1888, that the plaintiff was a pre-emption claimant to the land in controversy and did not pay for said land until after that date nor until after the construction of said road over the premises, he is not entitled to a verdict for any amount, and the jury are instructed to return a verdict for the defendant."

Thirteenth. The court erred in sustaining the action of the circuit court in giving to the jury that portion of the instructions of the court in words as follows:

152 "He is in any event to have the full value of the land they have taken for the right of way, and if the land that is left to him is injured in any way, then he is entitled, in addition to that, to have the difference between the whole tract and the value of what is left of it, taking the value as it was when the road was built, and the market value, irrespective of the effect on the market value by reason of the building of the road.

Fourteenth. The court erred in affirming the judgment of the circuit court, and in not reversing the judgment of the circuit court.

Wherefore the plaintiff in error, The Spokane Falls & Northern Railway Company, prays that the decision and judgment of the said circuit court of appeals for the ninth judicial circuit, as well as the judgment of said circuit court for the district of Washington, eastern division, in this cause be reversed.

ALBERT ALLEN,
JNO. R. McBRIDE,
Counsel for The Spokane Falls & Northern Railway Company, Plaintiff in Error.

(Endorsed:) Petition for writ of error & assignment of errors. Filed Dec'r 6, 1894. F. D. Monckton, clerk.

153 United States Circuit Court of Appeals for the Ninth Circuit.

THE SPOKANE FALLS & NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
WILLIAM H. ZEIGLER, Defendant in Error.
} Supersedeas Bond.

Know all men by these presents that we, The Spokane Falls & Northern Railway Company, a corporation organized under the laws of the State of Washington, as principal, and Daniel C. Corbin, of New York city, State of New York, and Austin Corbin, 2nd, of the city and county of Spokane, in the State of Washington, as sureties, are held and firmly bound unto the above-named William H. Zeigler in the sum of fifteen thousand two hundred and fifty dollars ($15,250), lawful money of the United States, to be paid to the said William H. Zeigler, his heirs, executors, and administrators or assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 14th day of November, in the year of our Lord one thousand eight hundred and ninety-four.

154 Whereas the above-named The Spokane Falls & Northern Railway Company has applied for a writ of error from the Supreme Court of the United States to the United States circuit court of appeals for the ninth district to reverse the judgment rendered in the said ciruit court of appeals in the above-entitled cause, affirming the judgment of the circuit court of the United States for the district of Washington, eastern division:

Now, therefore, the condition of this obligation is such that if the above-named The Spokane Falls & Northern Railway Company shall prosecute its said writ of error to effect and answer all damages and costs and pay the whole amount of the judgment of said circuit court, affirmed by the said United States circuit court of appeals, including just damages for delay and costs and interest accruing thereon on the writ of error, if it fail to make its plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[SEAL.] THE SPOKANE FALLS & NORTHERN R'Y CO.,
By D. C. CORBIN, *Pres't.*
D. C. CORBIN.
AUSTIN CORBIN, 2D.

Acknowledged before me this 14th day of November, 1894.

[SEAL.] GEO. H. MARTIN,
Notary Public, Residing at Spokane, Wash.

155 STATE OF WASHINGTON, } ss:
County of Spokane, }

Daniel C. Corbin, one of the sureties named in and who subscribed his name to the within and foregoing bond, being duly

sworn, says that he is a resident of the city, county, and State of New York; that he is worth more than the sum of *more than* twenty-five thousand dollars over and above all his debts and liabilities and exclusive of property exempt by law from execution.

DANIEL C. CORBIN.

Subscribed and sworn to before me this 14th day of November, 1894.

[SEAL.] GEO. H. MARTIN,
Notary Public, Residing at Spokane, Wash.

STATE OF WASHINGTON, }
County of Spokane, } *ss:*

Austin Corbin, being duly sworn, says that he is one of the sureties named in and who subscribed his name to the within and foregoing bond; that he is a resident of the city and county of Spokane, in the State of Washington, and is worth the sum of fifteen thousand two hundred and fifty dollars over and above all his debts and liabilities and exclusive of property exempt from execution.

AUSTIN CORBIN, 2D.

Subscribed and sworn to before me this 14th day of November, 1894.

[SEAL.] GEO. H. MARTIN,
Notary Public, Residing at Spokane, Wash.

The foregoing supersedeas bond, as to form, amount, and sufficiency of sureties, is hereby approved.

(Signed) STEPHEN J. FIELD,
Associate Justice Sup. Court U. S.

156 Resolved, "That Mr. D. C. Corbin, president of this company, be, and he is hereby, authorized as such president and in the name of this company to execute and deliver and cause to be delivered all such bonds, including supersedeas bonds, as may be necessary to perfect a writ of error from the United States Supreme Court to the United States circuit court of appeals in the case of The Spokane Falls & Northern Railway Company, plaintiff in error, *vs.* William H. Zeigler, defendant in error, and to stay execution in said case."

I, A. T. Herrick, assistant secretary of the Spokane Falls & Northern Railway Company, do hereby certify that the foregoing is a true copy of a resolution of the board of trustees of said company, duly adopted at a meeting of the board of trustees of said company duly held at the office of said company on the 1st day of June, 1894, as the same remains of record in the books of said company and of the whole of said resolution, and that the same now remains in full force.

In witness whereof I have hereunto set my hand and the seal of said company this 14th day of November, 1894.

A. T. HERRICK,
Assistant Secretary.

(Endorsed:) Supersedeas bond on writ of error to the Supreme Court. Filed Dec'r 6, 1894. F. D. Monckton, clerk.

157 United States Circuit Court of Appeals for the Ninth Circuit.

THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, Plaintiff in Error, *vs.* WILLIAM H. ZEIGLER. } No. 81.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and fifty-six pages, numbered from 1 to 156, inclusive, to be a full, true, and correct copy of the printed record and of all proceedings in our said court in said cause, and that the same together constitute the return to the annexed writ of error.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, this 17th day of December, A. D. 1894.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

158 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Spokane Falls & Northern Railway Company, plaintiff in error, and William H. Zeigler, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of November, in the year of our Lord one thousand eight hundred and ninety-four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

159 [Endorsed:] D. No. 81. Spokane Falls & Northern R'y Co., pl'ff in error, *v.* Wm. H. Ziegler. Writ of error. Filed December 6, 1894. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States within mentioned at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

160 UNITED STATES OF AMERICA, *ss:*

To William H. Zeigler, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Spokane Falls & Northern Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, this 23d day of November, in the year of our Lord one thousand eight hundred and ninety-four.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

161 [Endorsed:] D. No. 81. Spokane Falls & Northern R'y Co., pl'ff in error, *v.* Wm. H. Ziegler. Citation. Filed December 6, 1894. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

STATE OF WASHINGTON, } ss:
County of Spokane, }

On this 30th day of November, in the year of our Lord one thousand eight hundred and ninety-four, personally appeared before me the subscriber, Albert Allen, and makes oath that he delivered a true copy of the within citation to George Turner, Esq., one of the attorneys and counsellors of William H. Zeigler, defendant in error in the within-mentioned cause, said George Turner being a member of the firm of Turner, Graves & McKinstry, attorneys for said def't.

ALBERT ALLEN.

Sworn to and subscribed the 30th day of November, A. D. 1894.

[Seal of H. M. Stephens, Notary Public, State of Washington.]

H. M. STEPHENS,
Notary Public for the State of Washington,
Residing at Spokane.

Endorsed on cover: Case No. 15,767. U. S. circuit court of appeals, ninth circuit. Term No., 211. The Spokane Falls and Northern Railway Company, plaintiff in error, *vs.* William H. Ziegler. Filed January 11th, 1895.

167-63

167-65

Office Sup. me Court, U. S.
FILED
MAR 9 1897
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,
vs.
WILLIAM H. ZIEGLER.

No. 211.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

Brief for Plaintiff in Error.

A. T. BRITTON,
A. B. BROWNE,
Attorneys for Plaintiff in Error.

ALBERT ALLEN,
General Counsel.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1897.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,
v.
WILLIAM H. ZIEGLER.

No. 211.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is an action originally brought by defendant in error in October, 1891, in the Superior Court of Spokane County, State of Washington, to recover damages alleged to have been caused by construction of this railway through lands whereof plaintiff asserted possession and ownership. (Rec. 1–3.) On petition of the railway Company the cause was in February, 1892, removed to the Circuit Court of the United States for the district of Washington, Eastern Division (Rec. 5–11). Trial therein resulted in verdict and judgment for plaintiff for $7,500

(Rec. 20, 21), and affirmance by the United States Circuit Court of Appeals (Rec. 102).

ASSIGNMENT OF ERRORS.

These appear at large in the record (pp. 110, 111).

ARGUMENT.

I.

JURISDICTION.

Though not assigned for error, yet under recent decisions of this Court (and inasmuch as consent cannot confer jurisdiction of subject-matter) we are bound to submit that the U. S. Circuit Court had no jurisdiction herein and the cause was improperly removed to that Court.

It is settled law:

1. That under the Act of March 3, 1875 (18 Stats. 470, sec. 1), original jurisdiction was conferred upon and exercised by the U. S. Circuit Courts in cases in which the plaintiff's statement of his cause of action showed that he relied on some right under the Constitution or laws of the United States.

Feibelman v. *Packard*, 109 U. S. 421.
Kansas Pacific R.R. v. *Atchison*, &c., *R.R.*, 112 U. S. 414.
New Orleans v. *Houston*, 119 U. S. 265.
Bachrack v. *Norton*, 132 U. S. 337.
Cooke v. *Avery*, 147 U. S. 375.

2. That under the same Act right of removal from a State Court to the U. S. Circuit Court existed where the

record at the time of the removal showed that either party claimed a right under the Constitution or laws of the United States.

Railroad Co. v. *Mississippi*, 102 U. S. 135.
Ames v. *Kansas*, 111 U. S. 449.
Brown v. *Houston*, 114 U. S. 622.
Provident Savings Society v. *Ford*, 114 U. S, 635, 642.
Pacific R.R. Removal Cases, 115 U. S. 1.
Tennessee v. *Whitworth*, 117 U. S. 129, 139.
Southern Pacific R.R. v. *California*, 118 U. S. 109.
Bock v. *Perkins*, 139 U. S. 628.

But even under the Act of 1875 it was ruled that—

"A cause cannot be removed from a State Court simply " because, in the progress of the litigation, it may become " necessary to give a construction to the Constitution or " laws of the United States."

Gold Washing Co. v. *Keyes*, 96 U. S. 199.

Nor could *original* jurisdiction of the U. S. Circuit Court be so maintained upon the ground that the suit was one arising under the Constitution, laws, or treaties of the United States, unless that clearly appeared in the plaintiff's statement of his case.

Metcalf v. *Watertown*, 128 U. S. 586, 589.
Colorado Co. v. *Turck*, 150 U. S. 138, 143.

3. The now controlling Act of March 3, 1887, as corrected by the Act of August 13, 1888 (25 Stats. 434), corresponds with the Act of 1875, in respect to the *original* jurisdiction conferred upon the U. S. Circuit Courts, but by Section 2 the right of removal is confined to the defendant alone, and then only of suits " of which the " Circuit Courts of the United States are given original " jurisdiction by the preceding section."

The history of judicial construction under the Act of 1875, and the important and controlling change in respect to the right of removal as thus restricted by the Act of 1887–1888, is given at length in the opinion of this Court in *Tennessee* v. *Union and Planter's Bank et al.* (152 U. S. 454), decided March 19, 1894. Applying for the first time in those cases the law of 1888 in respect to jurisdiction in removal cases, the Court, p. 464, observes:

"In each of the three cases now before this Court the "only right claimed by the plaintiffs is under the law of "Tennessee, and they assert no right whatever under the "Constitution and laws of the United States."

And thereon in the case so removed the Court reversed the decree of the U. S. Circuit Court and directed that the cause be remanded to the State Court. This conclusion has been reaffirmed in *Mexican Nat. R.R. Co.* v. *Davidson* (157 U. S. 201, 208).

Applying these decisions to the case at bar, and it will appear from the plaintiff's complaint (Rec. 1–3):

1. That defendant railway Company is a corporation of the State of Washington, organized and existing under the laws thereof.

2. That plaintiff was on May 1, 1889, in possession as a pre-emptor under the laws of the United States of eighty acres of described land in Spokane County, Washington; had done the acts and things required by said law; had made final proofs and tendered payment and had before commencement of the action obtained the patent of the United States therefor "and plaintiff is now the "owner in fee of the said tract of land."

"3. That the defendant corporation is and was author- "ized by its articles of incorporation to build, equip, "and maintain and operate a line of steam railway from

" the city of Spokane in a northerly direction to the Co-
" lumbia river, and — said day of May 1st, 1889, the said
" defendant entered upon and seized and possessed itself
" of, and has ever since maintained possession of a strip of
" land fifty feet wide, extending through said tract of
" land held, possessed and owned by the plaintiff as afore-
" said, and has built thereon its railway track, and is now
" operating its line of railway over said strip of land;
" that the entry upon and seizure of said strip of land by
" defendant was under and pursuant to the laws of the
" then Territory of Washington authorizing railroad com-
" panies to appropriate lands for right of way for railroad
" tracks, and the said strip of land was appropriated by
" said defendant for the purpose aforesaid, and has ever
" since and is now being used for said purpose ; that the
" general course of said railway and of the said strip of
" land on which it is laid over the tract of land herein-
" before described is shown by the plat or map hereto
" attached and made a part of this complaint.

" 4. That the entry by defendant upon said tract of
" land and the appropriation of the strip thereof afore-
" said for railway purposes, was without the authority,
" but with the knowledge of plaintiff; that the said de-
" fendant has never paid plaintiff therefor, and has never
" taken legal proceedings of any kind to have his dam-
" ages for taking and injuriously affecting his said land
" fixed and determined."

5. That the land is in close proximity to the city of Spokane, and is valuable for residence purposes ; that the value of the land so taken is $5,000, and the injury to the remainder $25,000.

" Wherefore plaintiff demands judgment against said
" defendant for $30,000 as compensation for the taking
" of said strip of land, for the injuriously affecting of the
" remainder of the tract, and for cost of suit in this action
" to be expended."

It is apparent that the cause of action thus stated in no manner involved a right claimed under the Constitution and laws of the United States. *Contra* plaintiff plead ownership in fee under patent from the United States, but claimed solely that as the laws of the then Territory and present State authorized the defendant company to enter upon and appropriate land for railroad purposes, and the company had so lawfully entered and appropriated, the common right of action to recover damages therefor had accrued to plaintiff, which he thereby sought to enforce. His right to so recover and as so plead was not founded upon and did not involve any law of the United States, but arose solely under the law of the State. That his title came originally by claim under and patent from the United States did not raise a federal question, for the title to all land in the State was and is deraigned through the United States. This being clear, and resort to the petition for removal or other matter *dehors* the complaint not being allowable under the decisions cited *supra*, we submit the Circuit Court was without jurisdiction. Hence its judgment should be reversed with direction to remand the cause to the State court.

II.

THE MERITS.

The defense of the Railway Company as disclosed by its answer filed in the Circuit Court (Rec. 12–15) was:

1. Denial of injury to plaintiff by construction of its railway across his land, or that the value of the land so taken is $5,000 or any other sum.

2. Filing with Secretary of the Interior and approval by that officer on June 5, 1888, of copy of its articles of in-

corporation under the laws of the Territory (now State) of Washington and proof of organization thereunder, whereby and under the Act of March 3, 1875 (18 Stats. 482), it became entitled from that date to a right of way 200 feet in width with right to take from the public lands adjacent to such line materials necessary for construction of the road.

3. That in March, 1889, it began construction of its road; between March 8 and April 8, 1889, surveyed the same through the land in question; finished such construction in March, April, May, and June, 1889, and in that year completed its entire line from Spokane Falls to the Columbia River, and has since operated same.

4. That at time of filing with and approval of its articles of incorporation and proof of organization by the Secretary of the Interior, and until final completion of the road, the land here involved was public land of the United States, whereto the Government held title and was hence subject to the grant of right of way made by the Act of March 3, 1875.

5. That within twelve months after location of its line of railway over the land, and on August 3, 1889, it filed in the U. S. Land Department map or profile thereof which in December, 1889, and long prior to plaintiff's payment for and entry thereof was approved by the Secretary of the Interior.

6. That in construction of its railway no improvements of plaintiff were taken, destroyed, or damaged in any manner.

7. That its right was and is superior in time and in law to plaintiff's subsequent entry of and patent for the land so taken.

The affirmative or new matter thus plead was denied by plaintiff (Rec. 16–17).

The Act of March 3, 1875 provides—

"That the right of way through the public lands of the "United States is hereby granted to any railway company "duly organized under the laws of any State or Territory, "except the District of Columbia, or by the Congress of "the United States which shall have filed with the Secre- "tary of the Interior a copy of its articles of incorpora- "tion, and due proof of its organization under the same, "to the extent of one hundred feet on each side of the "central line of said road;

"Also the right to take from the public lands adjacent "to the line of said road, material, earth, stone, and "timber necessary for the construction of said railroad;

"Also ground adjacent to such right of way, for station "buildings, depots, machine shops, side tracks, turnouts, "and water stations, not to exceed in amount twenty "acres for each station, to the extent of one station for "each ten miles of its road. * * *

"SEC. 3. That the legislature of the proper Territory "may provide for the manner in which private lands and "possessory claims on the public lands may be con- "demned; and where such provision shall not have been "made, such condemnation may be made in accordance "with section 3 of the Act entitled, 'An Act to aid in the "construction of a railroad and telegraph line from the "Missouri river to the Pacific ocean, and to secure to the "Government the use of the same for postal, military, and "other purposes, approved July 1, 1862,' approved July "2, 1864.

"SEC. 4. That any railroad company desiring to secure "the benefits of this Act, shall, within twelve months after "the location of any section of twenty miles of its road, "if the same be upon surveyed lands, and, if upon unsur- "veyed lands, within twelve months after the survey "thereof by the United States, file with the register of "the land office for the district where such land is located, "a profile of its road; and upon approval thereof by the "Secretary of the Interior, the same shall be noted upon "the plats in said office; and thereafter all such lands "over which such right of way shall pass, shall be dis- "posed of subject to such right of way.

"Provided, that if any section of said road shall not be "completed within five years after the location of said "section, the rights herein granted shall be forfeited as "to any such uncompleted section of said road.

"SEC. 5. That this Act shall not apply to any lands "within the limits of any military, park, or Indian "reservation, or other lands especially reserved from "sale" * * *

The claim of Ziegler was a possessory one only at the time this railway was constructed. It is conceded that he did not make payment and entry or receive patent until afterward. Whilst such possessory claim was protected by Section 3 of the Act of 1875, and as construed by this Court in *Railroad Co.* v. *Osborn* (160 U. S. 101, 109), yet it is certain that value of the mere right of possession without ownership of the fee was all he could lawfully recover.

Yet the jury followed its verdict by the special finding that (Rec. 20, 21)—

"The defendant has appropriated for its right of way "a strip of land twenty-five feet in width on each side of "the center of its track extending across the plaintiff's "land described in the complaint, and no more, and that "the area of the plaintiff's land so appropriated is 1 and "$\frac{8}{10}$ths acres, and no more; *and the amount of damages "awarded by our general verdict is computed upon the basis "of the land appropriated for said right of way being a "strip fifty feet in width and containing* 1 *and* $\frac{8}{10}$*ths "acres.*"

It is thus manifest from this finding that the jury made its award upon the basis that plaintiff Ziegler was the *owner* of the land and not of a mere possessory claim thereto only. Yet it is well settled that until he had fully complied with law, had made final proof and payment of purchase price to the United States and consummated entry thereof, he did *not* have the title thereto, and it was

subject to grant or other disposal by the United States, a situation expressly stated and conceded in *Railroad Co.* v. *Osborn*, *supra*.

Hence the award was plainly excessive on this ground. The motion for new trial (Rec. 22, par. 2) covers this point, and exception was duly reserved to the trial court's denial of such motion (Rec. 24).

This finding of the jury followed the instruction of the Court that plaintiff was entitled to the full value of the land so taken and the difference in market value of the whole tract before the taking and afterward, "irrespective "of the effect on the market value by reason of the build- "ing of the road."

This charge was excepted to (Rec. 86), and is assigned for error here (Rec. 111, par. 13).

Furthermore the special finding *supra* clearly discloses that the jury awarded damages *only* for the land actually taken, and did not attempt to award damages for any alleged injury to plaintiff's remaining land.

In that view the award was excessive inasmuch as the *maximum* value of the land as such and as stated by plaintiff's witnesses was $1,000 per acre, and the land so taken was less than *two* acres, whereas the verdict and judgment was for $7,500, or at rate of about $4,000 per acre.

The plaintiff's witnesses testified as to the value of this land at the time of taking, May 1, 1889, as follows:

J. W. Strack (R. 28) $800 per acre.
G. B. Dennis (R. 36) $600 to $700 per acre.
H. N. Belt (R. 41) $400 per acre.
I. S. Kaufman (R. 45) $400 to $600 per acre.
Plaintiff Ziegler (R. 53) $600 to $800 per acre.
Adolph Munter (R. 54) $800 to $1,000 per acre.
M. M. Cowley (Rec. 54) $700 per acre.
T. F. Conley (Rec. 55) $600 to $700 per acre.

This ground is fully covered by the motion for new trial, its denial and exception thereto, *supra*.

The plaintiff's witnesses were asked and allowed to answer as to the full market value of the land over the objection of counsel that plaintiff did not hold title in fee, but a mere possessory right (Rec. 28, 45, 53), and was hence not entitled to recover such full value as if the owner of the fee. And this was also held and charged by the trial court and duly assigned for error both in the Court of Appeals (Rec. 95, par. 13), and in this Court (Rec. 108, par. 4, and 109, par. 13); for although the Court charged the jury (Rec. 83) that the plaintiff was not the owner in fee, and his right to the land at the time of the railway company's taking thereof was in contest in the U. S. Land Department, yet the practical result of its charge was to lead the jury to award plaintiff full damages as such owner far exceeding the value of the land as given by his best witnesses. This point is fully covered by the assignment of errors. (Rec. 108, par. 4.)

We submit:

1. The cause was wrongfully removed to the U. S. Circuit Court and hence should be remanded to the State Court, or,

2. The judgment of the Circuit Court was erroneous and should be reversed.

Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
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ALBERT ALLEN,
General Counsel.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

WILLIAM H. ZIEGLER,
DEFENDANT IN ERROR.

No. 211.

In Error to the United States Circuit Court of Appeals for the North Circuit.

Brief for Defendant in Error.

GEORGE TURNER,
Attorney for Defendant in Error.

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PLAINTIFF IN ERROR,
v.
WILLIAM H. ZIEGLER,
DEFENDANT IN ERROR.

No. 211.

BRIEF FOR DEFENDANT IN ERROR.

The complaint in this case, omitting the caption, verification, and the map in the complaint referred to, is as follows:

"Plaintiff complains and alleges:

"1. That the defendant is, and at all times, mentioned in this complaint, was a corporation organized and existing under and by virtue of the Territory (now State) of Washington.

"2. That on, to wit, the 1st day of May, 1889, the plaintiff was in possession as a pre-emptor under the laws of the United States of the following-described tract of land, lying, being, and situated in Spokane county, Washington, to wit: The east half of the southeast quarter of

section four, township twenty-five north, of range forty-three east, Willamette meridian, containing about eighty acres, and on said date had made all the improvements and had lived on the said land a sufficient length of time, and done all other acts necessary to entitle him to a patent to the same from the United States, upon making final proofs and paying the purchase price required by the laws of the United States, and on said date plaintiff had made final proofs and filed the same in the land office of the United States at Spokane Falls, and had tendered the purchase price thereof, to wit, two dollars and a half per acre, to the receiver of said land office, and had demanded from the register and receiver of said land office a final receipt evidencing his entry of any payment for said land.

"3. That the defendant corporation is and was authorized by its articles of incorporation to build, equip, and maintain and operate a line of steam railway from the city of Spokane in a northerly direction to the Columbia river, and — said day of May 1, 1889, the said defendant entered upon and seized and possessed itself of, and has ever since maintained possession of, a strip of land fifty feet wide, extending through said tract of land possessed and owned by the plaintiff as aforesaid, and has built thereon its railway track, and is now operating its line of railway over said strip of land; that the entry upon and seizure of said strip of land by defendant was under and pursuant to the laws of the then Territory of Washington authorizing railroad companies to appropriate lands for right of way for railroad tracks, and the said strip of land was appropriated by said defendant for the purpose aforesaid, and has been ever since and is now being used for said purpose; that the general course of said railway and of the said strip of land on which it is laid over the tract of land hereinbefore described is shown by the plat or map hereto attached and made a part of this complaint.

"(Here follows map marked p. 2a.)

"4. That the entry by defendant upon said tract of land and the appropriation of the strip aforesaid for railway purposes was without the authority, but with the

knowledge of plaintiff; that the said defendant has never paid plaintiff therefor, and has never taken legal proceedings of any kind to have his damages for taking and injuriously affecting his said land fixed and determined.

"5. That the said tract of land is in close proximity to the city of Spokane, and at the time of the taking and injuriously affecting of said land by the defendant it was very valuable for residence purposes, and for the purpose of being platted into town lots and blocks; that the said right of way extends diagonally across the said tract of land and renders it impossible to plat the part of the said land abutting on the right of way advantageously. That the building and operating a line of steam railway through said tract of land largely diminishes its value for residence purposes or for any purpose. That the railway is built through said tract of land at an elevation above the surface of the said tract in places, and below the surface at still other places, and thereby cuts and fills are made through the said tract, and all streets laid out across the said right of way will be required to conform to the grade of the railway, and lots abutting on said streets will be above and below the grade of the streets, and will be liable to be filled with water in times of rain and freshets and melting snows, and in the particulars aforesaid, and in others not enumerated, the said tract of land has been injuriously affected and damaged by the taking and appropriation of said right of way, and the building of a railway thereon, in the sum of twenty-five thousand dollars. That the strip of land taken and appropriated by said defendant is of the value of five thousand dollars.

"6. That since the taking and appropriation of said strip of land and the building by defendant of its railway thereon, and before the bringing of this action, the final proofs made by plaintiff and filed at the land office as aforesaid have been passed on and accepted as satisfactory by the proper officers of the United States; the money then tendered has been accepted and a patent from the United States to plaintiff for said tract of land has been duly executed and delivered to him, and plaintiff is now the owner in fee of the said tract of land.

"Wherefore plaintiff demands judgment against said defendant for thirty thousand dollars as compensation for the taking of said strip of land, for the injuriously affecting of the remainder of the tract, and for cost of suit in this action to be expended."

ARGUMENT.

I.

JURISDICTION.

The plaintiff in error, the defendant below, removed this case from the State court to the United States Circuit Court, fought it through in that court, after great delay, without a suggestion that the case was improperly removed, appealed from that court to the Circuit Court of Appeals, and submitted the case there without taking the point, and now makes the point for the first time in this court, after having delayed the plaintiff in his remedy for six years. It seems to us a very great hardship if it can do this successfully. Certainly the principles of law permitting such a breach of faith ought to be plain and peremptory to receive the sanction of this court.

But we are relieved of serious apprehension concerning the point because in our judgment the complaint makes a clear case arising under the laws of the United States.

"Cases arising under the laws of the United States are such as grow out of the legislation of Congress whether they constitute the right or privilege or claim or protection or defence of the party in whole or in part by whom they are asserted." (Railroad Co. *v.* Mississippi, 102 U. S. 135.)

"Whether a suit is one that arises under the Constitu-

tion or laws of the United States is determined by the questions involved. If from them it appears that some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States or sustained by the opposite construction, then the case is one arising under the Constitution or laws of the United States." (Cook v. Avery, 147 U. S. 384.)

First. The complaint avers that at the time of the appropriation of the land by defendant plaintiff was lawfully in possession of the same as a pre-emptor under the laws of the United States; that the defendant appropriated the same as a right of way for its railroad under and pursuant to the laws of the then Territory of Washington authorizing said railroad company to do so; and that defendant has never paid plaintiff for the land or for damaging the same or taken proceedings of any kind whatever to have his damages for taking and injuriously affecting the said land fixed and determined. Four Federal questions arise on the facts as presented by the complaint:

(*a*) Was the plaintiff lawfully on the land as a pre-emptor within the meaning of the laws of the United States?

(*b*) Did he have any right or title as a pre-emptor which could be protected against a taking for railway purposes under the laws of the Territory of Washington without compensation?

(*c*) If so, was his right or title under the laws of the United States such a one as that he was entitled to compensation not only for the value of the land actually taken, but for the injuriously affecting the balance of the land by reason of the building of the road through it?

(*d*) More than all this, if the averments of the complaint alone are to be looked at, the defendant below was

seeking to appropriate for railroad purposes without compensation, by virtue of the laws of the Territory of Washington permitting such unlawful action, a portion of the public domain held and occupied by the plaintiff as a preemption claim. We do not mean to say that such was in fact the provisions of the Territorial law, but that it would so appear from the averments of the complaint, and inasmuch as jurisdiction is to be determined by the complaint alone we are entitled to the benefit of those averments, and, under the peculiar circumstances of this case, to have them most strongly construed in our favor for the purpose of maintaining jurisdiction.

Second. It is not denied that a case arising under the laws of the United States would have been made if the complaint had alleged, in addition to the averments already referred to, the further averment that the defendant corporation had filed its articles of incorporation with the Secretary of the Interior under the act of Congress of March 3, 1875, quoted in the brief of plaintiff in error, and by virtue of said fact was entitled to a right of way through the public lands. In that case the further question would then have been presented of conflicting claims to the same land arising under different and distinct laws of the United States. We insist that the same facts must appear to the apprehension of this court upon the complaint as it stands.

"Facts of which the courts take judicial notice need not be pleaded." (Chitty on Pleadings, 17th Ed., Vol. 1, p. 236.)

The action of one of the executive departments of the Government in the matter of securing to a railway corporation a right of way under the laws of the United States is a public and official act of which the courts of the United States will take judicial notice. (Heath *v.* Wallace, 138 U. S. 573; Caba *v.* U. S., 152 U. S. 211.)

Third. The right of action of which the plaintiff was availing himself in this suit accrued under the laws of the Territory of Washington. Those laws were made pursuant to the organic act of the Territory, and pursuant to the act of Congress of March 3, 1875, authorizing the legislatures of the several Territories to "provide for the manner in which private lands and possessory claims of the public lands may be condemned."

At the time this action was brought the Territory had ceased to exist. For the purposes, however, of rights accruing under them the laws of the Territory had not ceased to exist. They did not exist as State laws. They existed by virtue of the laws of the United States, which called them into being and by which they had been approved. We respectfully insist that for the purposes of jurisdiction in this case the right predicated on those laws was a right arising under the laws of the United States.

II.

Merits.

Plaintiff in error evidently does not rely with any confidence upon the points made to the merits. It has failed to observe the direction of the second clause of Rule 21 of this court, and we assume that the court will give but little if any consideration to its arguments for the reasons stated. We will take up and consider the points presented by the plaintiff in error on the merits in the order in which they are made in its brief.

First. That the award of damages was excessive.

(*a*) Neither in the Circuit Court of Appeals nor in this court is there any assignment of errors to the effect that the damages awarded in the lower court were excessive.

Consequently the point cannot be considered by this court unless the court of its own option chooses to notice it. (Rule 35, Rules of the Supreme Court of the United States.)

This court will not, we believe, notice the point of its own motion when it understands the object of the special finding referred to as sustaining the contention that the damages were excessive. The complaint in this case alleges that plaintiff in error had appropriated a right of way 50 feet wide. The plaintiff in error in its answer alleged that it had appropriated a right of way consisting of 100 feet in width on each side of the central line of its road. [Paragraph 7—Affirmative Matter of Answer.] On the trial plaintiff below was proceeding to prove his damages on the theory of the answer as to the quantity of land appropriated when plaintiff in error asked to have its answer amended so as to limit its claim of appropriation to a strip 50 feet wide. It was then agreed between the parties, in open court, that the strip actually appropriated would be considered as only 50 feet wide, and that the special finding in the form in which it appears in the record should be submitted to the jury with a direction to bring it in along with the general verdict. An additional reason for doing this was that, under the statute in force at the time the appropriation in this case was made, a method of condemnation was provided in which the quantity of land condemned was determined and a decree entered vesting title in fee simple in the railway company on payment of the damage awarded. That act had been repealed, as to the right of the land owner to institute proceedings, at the time this action was commenced, and hence a common-law action, in the form disclosed in the record, was brought by defendant in error. There being no method of vesting title in the

railway company, in said action, it was thought best for the protection, both of the railroad company and the land owner, that a special finding of the quantity of land actually appropriated should be made. The finding was prepared by the court, and the jury directed to bring it in along with their general verdict, with the consent and at the request of both parties to the action and for the purpose aforesaid, and none other.

(*b*) But we submit that the special finding, when properly considered, does not sustain the contention that the only thing taken into consideration by the jury in making up its verdict was the one and eight-tenths acres actually appropriated, and, therefore, that the verdict rendered was necessarily excessive. The sense of the finding is that the general verdict was computed on the basis of the right of way being a strip of land 50 feet wide, rather than a narrower or a wider strip, and considered in that sense the finding does not negative the idea that other elements of damage besides the value of the right of way actually appropriated entered into the verdict. This court can see from the testimony, the instructions of the court, and the exceptions reserved, that the incidental damage to the tract of land was the main feature of the case, and that that feature necessarily entered into the computation of the damages awarded by the jury. In view of that fact the court will not be hypercritical in the endeavor to discover some inconsistency between the special finding and the general verdict which will invalidate the latter.

(*c*) "The practice of the United States courts does not contemplate special findings of fact in connection with general verdicts as does that of many of the States, and a practice of that kind in the State court is not binding on the Federal court. (Nudd *v.* Burrows, 1 Otto, 246.) So that if the special finding in question conflicts with the

general verdict the court was justified in rendering judgment on the latter.

For the purpose of showing that the damages were excessive, plaintiff in error has collated the values attached to the land by a number of witnesses on the trial below by the defendant in error. In addition to the estimates of value thus collated the court should consider the testimony of each of the said witnesses as to the incidental damage done to the tract of land by the building of the road.

J. W. Strack, who testified that the land was worth $800 per acre, at page 28 of the record, also testified, at page 31 of the record: "I would say for one tier of blocks, or for a distance of 300 feet north of the north line of the right of way, it was damaged 50 per cent.; on the balance of the tract lying north of this I would say it would be damaged probably 20 per cent. of its original value; on the south side I do not consider it would be damaged to any extent at all beyond the limit of 300 feet; that would be about one tier of blocks, and to that extent it would be damaged 50 per cent."

Mr. G. B. Dennis, who testified, at page 36 of the record, that the land was worth from six to seven hundred dollars per acre, also testified, at page 37 of the record: "I should say that within a depth or distance of 200 feet on either side of the track the damage would not be less than 40 or 50 per cent., and then beyond that anywhere from 20 to 25 per cent. The damage from 20 to 25 per cent. would extend out, I should judge, from 600 to 1,000 feet distant on each side. There might be some damage beyond that, but it would be very small."

Mr. I. S. Kaufman, who testified, at record page 45, that the value of the land was from four to six hundred dollars per acre, also testified, at page 46 of the record:

"I should think in the immediate vicinity it depreciates the value of the land probably 20 to 25 per cent."

Adolph Munter, who testified, at page 54 of the record, that the value of the land was from eight hundred to one thousand dollars per acre, also testified, at page 54, with reference to the diminution of the value of the balance of the land: "It would be about 30 per cent There would be a decrease of 30 per cent. in the value of the land—in the value of the entire 40."

Mr. M. M. Cowley, who testified, at page 56 of the record, that the value of the land was $700 per acre, also testified, on the same page: "If I was valuing it (the land) for suburban lots for building a house there to live on, I would value the lots a block away from the railroad 50 per cent. higher than I would the lots on the railroad, and two blocks away from the railroad about 25 per cent. higher. That is about the value I put on it. I would put 50 per cent. depreciation on the first blocks adjoining railroads, and the second blocks 25 per cent."

Mr. T. F. Conley, who testified, at page 57 of the record, that the land was worth from six to seven hundred dollars per acre, also testified concerning the depreciation of the balance: "The construction of the railroad across it would diminish its value. I would say that the land would be depreciated in value the first hundred feet outside the right of way at least 75 per cent.—that is, on each side of the right of way, and for 300 feet beyond this on each side again it would be diminished or depreciated 50 per cent., and probably that part lying north of the road to the north line of the property would be depreciated 10 per cent."

The court below, in charging the jury concerning the element of plaintiff's damages, said:

"As I have said, the court holds the plaintiff to be the owner of the land, but I do not wish to be understood by that as saying that he was then the owner in fee; that he had a title in fee or other rights than such as belonged to a settler under the pre-emption law of the United States, which give him a possessory right and a vested interest in the property, so that no part of it could be lawfully taken from him without compensation being paid for it; and in determining the amount of damages to be awarded to him you will take the circumstances into consideration of the condition in which the title was at the time the road was built and award him the value of the property as you find it to be, considering the title to be involved as it was by reason of the matter being undetermined in the Land Department as to his right to it, and there being a contest and that he was being obstructed in obtaining his patent to it by reason of a dispute as to its right. Now, taking that into account, you will award him such amount of damages as will compensate him for so much of the land as the railroad company have appropriated for the right of way and for whatever injurious effect the road may have caused to the land which he owned, the balance of the 80-acre tract described in his complaint." (Record, page 83.)

It will thus be seen that there was ample evidence to sustain the verdict rendered by reason of the incidental damage to the tract of land caused by the building of the road through it. It will also be seen that that element of damage was submitted to the jury by the court. In view of these facts it will be an exceedingly strained construction of the special finding upon which plaintiff in error bases its contention to hold that the verdict was based on the idea that Ziegler was the owner in fee of the land or that the only element of damage considered by the jury was the value of the one and eight-tenths acres of land actually taken by the railroad for its right of way.

Second. Included in the argument of plaintiff in error

upon the question of excessive damages is the statement that the special finding of the jury followed the instructions of the court, "that the plaintiff was entitled to the full value of the land taken and the difference in market value of the whole tract before taking and afterwards irrespective of the effect on the market value by reason of the building of the road;" and then the statement is made: "This charge was excepted to (Record, 86) and is assigned for error here (Record 111, paragraph 13)." Whether or not by this language plaintiff in error intended to here complain of the charge of the court seems to be uncertain. In what respect if, any, the charge was erroneous is not pointed out. That the charge was in strict conformity to the laws of Washington on the subject of damages in such cases see Enoch *v.* Spokane Falls and Northern Ry. Co., 6 Wash. 394.

Third. We respectfully submit that the objections to testimony referred to by plaintiff in error in its brief, page 11, were properly overruled.

There is only one way of estimating the value to a pre-emption claimant of a tract of land held by him as such; that is, by the determination of the value of the land itself and a consideration of the extent to which, if any, the nature of his right decreased that value. To ask a witness what the value of a pre-emption claim was per acre would be absurd. The jury understood at all times during the progress of the case, as the court will see from the record, that it was the value of the land considered as a pre-emption claim which they were allowing to the plaintiff and not the value of a fee-simple title to the land. Moreover, this fact was made plain beyond contention by the charge of the court which we have quoted and by the remarks of the court in ruling upon the objections interposed by counsel from time to time concerning interroga-

tories as to value. The case was fairly tried on the evidence and fairly submitted to the jury upon the charge of the court, and the verdict of the jury was strictly in accordance with the evidence and with the charge of the court, and the record is absolutely free from error.

Respectfully submitted.

GEORGE TURNER,

Attorney for Defendant in Error.